

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NOVATO FEDERATION OF TEACHERS,)	
LOCAL 1986, AFT, AFL-CIO,)	
)	
Charging Party,)	Case No. SF-CE-473
)	
v.)	PERB Decision No. 210
)	
NOVATO UNIFIED SCHOOL DISTRICT,)	April 30, 1982
)	
Respondent.)	

Appearances: Robert J. Bezemek, Attorney (Bennett & Bezemek) for Novato Federation of Teachers, Local 1986, AFT, AFL-CIO; Diana K. Smith, Attorney (Breon, Galgani and Godino) for Novato Unified School District.

Before Gluck, Chairperson; Jaeger and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Novato Unified School District (District) to the hearing officer's attached proposed decision finding that the District violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)¹ by removing certificated

¹The EERA is codified at section 3540 et seq. of the Government Code. Unless otherwise indicated, all citations are to the Government Code.

Subsections 3543.5(a) and (b) provide:

It shall be unlawful for a public school employer:

(a) Impose or threaten to impose reprisals

employee George de Tuncq from his position as chair of the social studies department at Novato High School and transferring him to another school because of his participation in protected activities.² The District also excepts to his proposed remedy.

The Board has reviewed the record and finds that the hearing officer's procedural history and findings of fact as set forth in the proposed decision are free from prejudicial error and are adopted by the Board itself.

For the reasons explained below, the Board concludes that the District violated subsection 3543.5(a), but dismisses that portion of the charge alleging a violation of subsection 3543.5(b).³

on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

²The Novato Federation of Teachers, Local 1986, AFT, AFL-CIO (NFT or Federation) did not except to the hearing officer's dismissal of that portion of the charge it filed alleging that the District violated the Act by not providing the employee organization with information regarding involuntary transfers of personnel, thereby preventing the NFT from fulfilling its obligations as an exclusive representative.

³This case is properly before this Board, even though we find the initial charge filed by the NFT to be somewhat deficient. All issues have been raised and fully litigated during the course of the hearing. See Prohoroff Poultry Farms

DISCUSSION

This case presents an opportunity for the Board to clarify the principles articulated by this Board in Carlsbad Unified School District (1/30/79) PERB Decision No. 89, particularly in light of the National Labor Relations Board (NLRB) decision in Wright Line_f, A Division of Wright Line, Inc. (8/27/80) 251 NLRB No. 150 [105 LRRM 1169].

In Wright Line, supra, the employer was found to have violated subsections 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act (NLRA)⁴ when it discharged an employee, allegedly for violating a rule against knowingly altering or

v. Agricultural Labor Relations Board (1980) 107 Cal App3d 633 [Cal Rptr]; NLRB v. Iron Workers, Local 433, (1979) 600 F.2d 770 [10] LRRM 3119] .

⁴The National Labor Relations Act is codified at 29 U.S.C, subsection 151-68.

Section 8(a) states:

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7,

.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

falsifying production time reports, payroll records, and time cards, since the General Counsel had made a prima facie showing that union activity was a motivating factor in the employer's decision to discharge the employee and the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his union activity.

In Carlsbad, supra, the District was found to have violated subsections 3543(a) and (b) when it transferred certain members of Oceanside-Carlsbad Federation of Teachers, CFT/AFT, AFL-CIO, Local 1344 from the high school to a junior high school. Carlsbad, supra, and Wright Line, supra, are not mutually exclusive. On the contrary, both have developed a but-for test to assist in analyzing charges primarily of discriminatory conduct.⁵

We noted in Carlsbad, supra that subsection 3543.5(a) essentially combined the provisions of subsections 8(a) (1) and 8(a) (3) of the NLRA.⁶ We concluded that unlawful motive did

⁵The California Supreme Court has approved a similar but-for analysis citing Wright Line. Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721.

⁶Generally, with respect to "intent" the NLRB and federal courts have drawn a distinction between sections 8(a) (1) and 8(a) (3). While unlawful intent appears not to be a necessary element of an interference charge under 8(a) (1) (Gorman, Basic Test of Labor Law (West 1976) p. 132 et seq.), it has generally been held to be a necessary ingredient in finding a violation of section 8(a) (3). Carlsbad, supra, pages 6 and 7. Gorman, Basic Test on Labor Law (West 1976) p. 132 and 137 respectively.

not need to be affirmatively proven in all cases involving alleged violations of subsection 3543.5(a). We continue to uphold such a conclusion. A prima facie charge alleging interference was established in Carlsbad by facts showing that there was a nexus (connection) between the employer's conduct and the exercise of a right protected by EERA with resulting harm or potential harm to that right. A violation was found because the harm to employee rights outweighed the employer's proffered business justification.⁷

Protected activity was a motivating factor in the District's action

Here, the charge alleges that the District's removal of de Tuncq as the chair of the social studies department and his involuntary transfer, first, to a permanent substitute pool, then to Sinaloa Junior High School as a permanent substitute, and finally to San Jose Junior High School constituted a reprisal against de Tuncq because of his activities as a union representative.

The NLRB and courts have generally considered employer conduct such as charged here to be covered by

⁷Unlike Wright Line and the instant case, in interference cases where motive/intent is not an issue, the charging party need only make a prima facie showing that the respondent's conduct tends to or does result in harm to employee rights granted under EERA. The respondent then has the burden of producing an operational necessity justification. The Board will then balance the competing interests of the parties and resolve the charge accordingly.

section 8(a) (3). These forums have recognized the volitional nature of discriminatory conduct. To establish a violation under section 8(a) (3), it must be proven that the employee was engaged in protected activity and that the employer's conduct was motivated by that participation. Radio Officers Union v. NLRB (1954) 347 U.S. 17 at pp. 43-44 [33 LRRM 2414]. Because retaliatory conduct is inherently volitional in nature, we conclude that the same requirements are appropriate under EERA where it is alleged that the school employer has taken reprisals against employees for participation in protected activity. Accordingly, unlawful motive is the specific nexus required in the establishment of a prima facie case.

In Carlsbad, the Board recognized that direct proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, the Board concluded that unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. Carlsbad, supra, at p. 11; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620; Radio Officers Union v. NLRB, supra, at pp. 40-43.

To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. NLRB v. South Shore Hospital (1978 1st Cir.) 571 F.2d 677 [97 LRRM 3004]. Knowledge along with other factors may support the inference of unlawful

motive. The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive. In general, the inference can be drawn from a review of the record as a whole. See Radio Officers, supra.

In the instant case, the Novato Federation of Teachers established and the hearing officer found that Mr. de Tuncq had a strong history of activist involvement with the Novato Federation of Teachers, which had been the exclusive representative of the teachers since 1976. Since that time de Tuncq had served as a grievance officer, a member of the grievance committee, and a building representative. The District concedes they were aware of de Tuncq's union activity.

The District's transfer of de Tuncq on May 28, 1980, was approximately related in time to three events which lead to direct confrontations between him and principal Barry Conner:

1. The most immediate occurred in January of 1980. It involved the imposition of a new requirement by Principal Conner to enter absences and tardies on report cards - although none of the other high schools in the District had a similar requirement, de Tuncq strongly objected to making the new duty

mandatory not only because the data was not consistent class to class or teacher to teacher, but also because it represented an increase of work for teachers. To voice this position, de Tuncq and another teacher distributed a memo stating their objections as well as charging that the new duty wasn't negotiated. On January 24, 1980, de Tuncq sent another memo to the faculty stating that this new duty "was not a 'must.'"

On March 24, 1980, de Tuncq received his annual performance evaluation and was given the highest rating of "one-effective" in all areas except record keeping, in which he received a "needs-to-improve." This was prompted by de Tuncq's refusal to follow the new procedure. Two days later, on March 26, in response to the low rating, de Tuncq wrote a memo to Conner in which he reaffirmed his opposition to the policy change and stated that he would continue to defy the new recording procedure. A little over a month later, on May 14, de Tuncq was notified by Conner that he was being relieved as departmental chair and that he might be transferred.

2. de Tuncq's vocal representation of unit employees during a successful grievance he filed on behalf of the Federation against the District for its failure to bring the size of classes into conformity with the size established under the collective bargaining agreement, and

3. A dispute over teaching basic language skills, where Conner had to retreat from his initial position.

The District's unlawful motivation in transferring de Tuncq is further inferred by the fact that de Tuncq had generally and consistently received good evaluations.⁸ As we have mentioned, de Tuncq's annual performance evaluation from principal Conner on March 24, 1980, reflected the highest rate of "one-effective" in all areas. The only exception was in record keeping, in which he received a "needs-to-improve." As noted above, this was prompted by de Tuncq's refusal to follow a procedure Conner wanted implemented but which de Tuncq considered new and strictly optional to the teachers. On May 12, 1980, Conner first told de Tuncq he was relieving him of his duties as department chair and thinking of transferring him out of Novato High School. On May 28, 1980, de Tuncq was officially informed of the transfer.

⁸On March 19, 1979 Conner evaluated de Tuncq "one-effective" in all areas where the numerical rating is used,

In order to fully understand the significance of these evaluations, one must be familiar with the evaluation system in the District. Teachers are numerically rated in three main areas: (1) instructional competence, (2) classroom management and (3) professional qualities. Each of these areas is broken down into several factors. Instructional competence is broken into relations with students, teaching on the student's level, instruction procedures, and knowledge of subject matter. Classroom management is broken into classroom control, care and appearance of classroom, and reports and records. Professional qualities include cooperation with staff, professional self-improvement, relations with parents, and interest in extra curricular activities. The numerical ratings are "one-effective; two-needs to improve; and three-not observed." In addition, the evaluation form includes an area where the evaluator may enter written comments about the evaluatee.

In addition, it was revealed at the hearing that Mr. Conner began compiling a secret file only on Mr. de Tuncq. The file contained information regarding union activities as well as job performance. Conner testified he could not recall when he began the file.⁹ The majority of the information was placed in the file only after the events in March even though many of the parental complaints, class drops, and transfers occurred months earlier.

Conner testified that he usually kept records of parental complaints so that he could later discuss the matter with the teacher if it was at all serious. Conner, however, did not investigate or discuss with de Tuncq the merits of several of the parental and student complaints. This was not done even though many of the complaints dealt with aspects of teaching which Conner had praised in de Tuncq's evaluation, written very shortly before these complained-of events.

⁹Conner's testimony on the maintenance of secret files was inconsistent and contradictory. Initially Conner testified that he did not maintain similar files on other teachers. Later, when the District's counsel questioned him, Conner said that a file was kept on every employee. He, however, did not clearly indicate when he said this whether he was referring to the school's official personnel files or "secret files." From his previous testimony, we infer that he meant that an official personnel file was kept on every employee, but de Tuncq was the only one on whom Conner maintained a secret file.

Most of the material contained in the secret file had never been shown to or discussed with de Tuncq as is required under Education Code section 44031.10

The California Supreme Court has recently interpreted this section to mean that:

Unless the school district notifies the employee of such derogatory material within a reasonable time of ascertaining the materials, so that the employee may gather pertinent information in his defense, the district may not fairly rely on the material in reaching any decision affecting the employee's employment status. Miller v. Chico Unified School District (1979) 24 Cal.3d 703, 713, 157, Cal.Rptr 72.

¹⁰Education Code, section 44031, states in relevant part:

Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

.

Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employment district.

Information of a derogatory nature, except material mentioned in the second paragraph of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comment thereon. Such review shall take place during

The fact that the District violated the above-mentioned Education Code provision as well as its own official policy¹¹ by not notifying Mr. de Tuncq of the majority of the complaints filed against him when the District in fact claimed to have relied on that information for his transfer is evidence of improper motive. Far Mar Co. (1977) 231 NLRB 814 [96 LRRM 1133]. Therefore, it is not inappropriate to conclude that the file was kept for the purpose of building a case against de Tuncq.

The Board finds further support for an inference of unlawful motive from the District's proffering of various and shifting justifications for its actions. These are amply set

normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

¹¹The District's official policy (policy 4100) on personnel files reads in relevant part as follows:

C. Anonymous material shall not be placed in personnel files.

D. Information or statements of a derogatory nature, except material obtained for the purposes of hiring, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon within three (3) days. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comments thereon. Such review shall take place during normal school hours, and the employee shall be released from duty for this purpose without loss of pay.

forth in the hearing officer's proposed decision. A summary of these include: de Tuncq was never offered a reason why the District was removing him as chair of the social studies department until he requested an explanation. The formal transfer notice did not offer a reason for the transfer. According to Conner, de Tuncq's attitude and his relationship with students was unsatisfactory. Conner also testified he told de Tuncq that he had been at Novato High School for over 20 years and needed a change, that he had become "engrained" in his courses. At the first step grievance after his transfer Conner indicated de Tuncq was being transferred for the good of the school. At the hearing he elaborated on the various reasons which prompted the decision to transfer de Tuncq: de Tuncq carried a lighter teaching load than other teachers, implying that students were unwilling to remain in his class; students complained about being confused and not knowing the requirements in de Tuncq's courses.

Evidence that a respondent failed to offer justification to the aggrieved employee at the time it took action against him or that it offered exaggerated or vague and ambiguous reasons, is relevant in deducing improper motive. See Mid-Ohio Automotive (1972) 200 NLRB 589 [82 LRRM 1331]. See also Taft Broadcasting Co. (1978) 238 NLRB 588 [99 LRRM 1403]; Savin Business Machines Corp. (1979) 242 NLRB 435 [101 LRRM 1205]. In a similar vein, by raising at the hearing for the first time

new justifications, the District appears to be attempting to legitimize its decision after the fact. This too is supportive of an inference that the District was unlawfully motivated. 16

After entertaining all of these factors, the Board draws the inference that de Tuncq's protected conduct was a motivating factor in his involuntary transfer.

The burden of producing evidence in subsection 3543.5 (a) cases

Once the charging party has made a prima facie showing sufficient to support the inference that the exercise of employee rights granted by EERA was a motivating factor, as the Federation has established, the burden shifts to the employer to prove that its action(s) would have been the same despite the protected activity. Wright Line, supra, Martori, supra.

We note that the shifting of burdens does not undermine nor does it conflict with the requirement of Board rule 32178 that the charging party must establish an unfair labor practice by a preponderance of the evidence. After all the evidence is in, it is a question of the sufficiency of the proof proffered by the various parties. The shifting burden merely requires the employer to make what is actually an affirmative defense to the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden.

The District argues that its decision to transfer de Tuncq was not based on his protected activity but was based primarily on his routinely small class load and an excessive number of

parental and student complaints regarding his grading policies, clarity of assignments, and poor relations with both parents and students.

The District contends that under Education Code section 35035(c) it has unlimited and unqualified discretion to transfer employees involuntarily. The section reads:

The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him:

(c) Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. Such power to assign includes the power to transfer a teacher from one school to another school at which the teacher is certificated to serve within the district when the superintendent concludes that such a transfer is in the best interest of the district.

We will consider each of the District's contentions. We find little merit in the District's first justification that de Tuncq experienced high rates of transfer and drops from his courses and, as a result, had a smaller class load than other teachers. As the hearing officer points out, the record indicates that the total number of withdrawals from de Tuncq's classes during 1979-80 was not appreciably greater than the rates he and other teachers had experienced in prior years, nor had any received any disciplinary action because of the higher numbers.

The District contends that from 1977-80 de Tuncq suffered an average loss greater than any other teacher. However, this data was not gathered until two months after Conner's decision to transfer de Tuncq. Conner admitted at the hearing that he did not keep a close tally on student drops and transfers.

We differ with the hearing officer's characterization of the District's arguments as pretextual.¹² We do find some merit to the District's contention that one of the reasons it transferred de Tuncq was due to a high number of parent and student complaints. Several witnesses supported the District's contention.

Where, as here, the case revolves around the existence of both lawful and unlawful motive, the Board must determine whether the employer would have taken its action had the employee not engaged in protected activity.

¹²When the Board concludes that the employer's proffered justifications are pretextual, the charging party prevails because the respondent has failed to meet its burden of presenting evidence of lawful motive; i.e., the employer would not have taken the actions it did "but for" the employee's protected activity.

Carlsbad set forth a single test applicable to all cases alleging a violation of section 3543.5(a). The decision here is not to the contrary. The "nexus" requirement is, of course, refined in unlawful motive cases. The Board will in all cases consider the justification offered but will apply the "but for" principle only in unlawful motive cases.

There were three pre-March 24, complaints. Conner mentioned the complaints of Ziss, Chaney and Morrill as examples of incidents which figured in the transfer decision.

We are not persuaded that these pre-March 24 complaints formed a valid basis for the involuntary transfer. The Ziss and Morrill incidents occurred during a period when Conner evaluated de Tuncq as "effective" in dealing with students and parents. The Chaney incident similarly occurred during a period when Conner rated de Tuncq "effective" in cooperation with staff. There was no evidence that Chaney or his parents complained about de Tuncq. Conner apparently never considered their complaints significant enough to record in de Tuncq's written evaluations.

The District's testimony was that de Tuncq had received approximately 11 other complaints. However, the record indicates that there were at most only five. Another five appear to be student transfer requests which were not intended to be complaints. A sixth complaint was filed after a school official suggested that the student submit one. Some centered on disagreement with de Tuncq's grading criteria, especially with reference to his use of punctuality and attendance as factors in grading. These complaints manifested themselves in parent and student dissatisfaction with actual letter grades. However, the evidence indicates that a teacher has the option of using attendance as a grading factor. Conner was well aware

of de Tuncq's grading procedures and never objected or counseled de Tuncq to change them. Conner further seemed to have accepted these complaints at face value and, for the most part, did not discuss them with de Tuncq even though he usually discussed student/parent complaints with teachers if they were "at all serious."¹³

Other complaints criticized de Tuncq for his alleged inability to provide adequate instructions or explanations about course requirements. In de Tuncq's March 24 evaluation, Conner praised the "clarity with which he [de Tuncq] gives assignments."

The record also indicates that de Tuncq distributed handouts at the outset of the personal philosophy course which detailed the course requirements and explained what was meant by the evidential file.

The third general category of complaints involved comments allegedly by de Tuncq to students and/or parents. We affirm the hearing officer's analysis and evaluation. Although de Tuncq demonstrated poor judgment in a couple of instances, such as walking away from a student and refusing to discuss her grade with her or commenting to a student before the whole class regarding his parent's complaint, these instances are not

¹³Conner had some discussion with de Tuncq about the grade-oriented complaints of only Briggs and Wilherm. The record does not indicate that there was any discussion about the other complaints.

sufficient to rebut the inference of unlawful motive already established. They were generally exaggerated by Conner without investigation or never really discussed with de Tuncq, yet used as a basis for the involuntary transfer.

We further reject the District's contention that section 35035(c) of the Education Code provides it with the unlimited and unqualified right to transfer employees involuntarily. The District's transfer discretion is inherently limited by the requirement that it be exercised reasonably and in the best interests of the educational objectives of the school system. See Adelt v. Richmond School District (1967) 250 Cal.App.2d 149 [58 Cal.Rptr. 151]; Duhart v. Woodward (1929) 99 Cal.App. 736 [279 P. 493]; cf. Palos Verdes Peninsula Unified School District (2/26/82) PERB Decision No. 195.

Further, the District's prerogative is not absolute and its decision to transfer cannot be protected where, as here, the motive for such a transfer is unlawful.

Further, the Board must consider Education Code section 35050(c) in light of EERA section 3543.5(a), two separate statutory provisions which are seemingly inconsistent or contradictory: the Code's permissive section 35035(c) and EERA's prohibitive section 3543.5(a). It is a principle of statutory construction that:

. . . relevant to resolving seeming inconsistencies in separate codes is the

rule declaring that codes blend into each other and constitute a single statute for purposes of statutory construction. 58 Cal.Jr.3d 416, citations omitted.

The protection of an employee's right to engage in protected activities free of reprisal is a fundamental legislative purpose which would be defeated if we adopted the District's position.

By so limiting the District's power of transfer to purposes not prohibited by EERA, the Board harmonizes the two sections without depriving the District of the discretion to transfer employees in the legitimate interests of the school system.

The relevant justifications presented by the District are insufficient to balance the evidence that it would not have taken this action against de Tuncq but for his union activities. Accordingly, we conclude that the Federation has established by a preponderance of the evidence that the District violated subsection 3543.5 (a) when it removed de Tuncq as department chair and involuntarily transferred him to another school.

In making this finding we rely heavily on the proximity in time of the District's action to de Tuncq's aggressive and vocal participation in grievance representation, the maintenance of the secret file of de Tuncq's union activities, the severity of the action taken despite de Tuncq's 23 years of unblemished service, the disparity between de Tuncq's evaluations and the

sudden emphasis on his recent difficulties with a few students, and Conner's failure to investigate parental complaints and to follow proper notification procedures.

Respondent has also filed a request to reopen the record to provide additional evidence regarding the operational necessity standard in Carlsbad, supra. The District argues that actual evidence as to how the transfer improved the operation of the District was not available at the time of the hearing. The request is denied because the issue in question is to what extent was the fact that de Tuncq engaged in protected activity a motivating factor for the transfer. If the District is claiming an operational necessity for the transfer, it must be based on facts which are concurrent or which antedate the decision to transfer, not on alleged improvement a year from the transfer date.

Section 3543.5(b) Violation

The Board does not conclude, as did the hearing officer, that reprisals against an employee acting as a grievance representative inherently, and therefore concurrently, deny an employee organization the right to represent its members. Since the Association failed to demonstrate that its rights under EERA were adversely affected by the District's actions against de Tuncq, we dismiss the charge alleging a violation of section 3543.5(b).

REMEDY

Section 3541.5(c) empowers the Board

. . . to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District is ordered to cease and desist in its unlawful actions against de Tuncq. Since de Tuncq has suffered financial loss as a result of his removal as department chair, he is entitled to be made whole for the entire period of such loss. However, because de Tuncq's immediate reinstatement might impact on District employees who have replaced him and cause reassignments during the middle or end of the semester at the junior high school where de Tuncq presently teaches, we find it appropriate that his reinstatement at Novato High School as chairman and full-time teacher in the social studies department be deferred until the beginning of the 1982-83 school year.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is ORDERED that Novato Unified School District shall:

CEASE AND DESIST from violating section 3543.5(a) of the EERA by taking reprisals against George de Tuncq because of his participation in protected activities.

It is further ORDERED that the District shall take the following affirmative action:

1. Make an immediate unconditional offer to de Tuncq to reinstate him at the beginning of the next semester to his former positions as chairman and full-time teacher in the social studies department at Novato High School; de Tuncq should be given a reasonable time in which to respond.

2. Provide payment with interest at seven percent per annum to de Tuncq for compensation lost as a result of being removed as departmental chairman from the date of his removal to the date he is restored to that position or until the date he declines such restoration.

3. Within five workdays following service of this decision, post copies of the attached notice to employees as set forth in the attached Appendix for a period of twenty (20) workdays in a conspicuous place at such locations as notices to certificated employees are customarily posted.

4. At the end of the posting period, notify in writing the regional director of the Public Employment Relations Board, San Francisco Regional Office, of the action taken to comply with this Order.

By _____
Irene Tovar, Member

Harry Gluck, Chairperson

John W. Jaeger, Member

APPENDIX

NOTICE TO CERTIFICATED EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-473, Novato Federation of Teachers, Local 1986, AFT, AFL-CIO v. Novato Unified School District, in which both parties had the right to participate, it has been found that the Novato Unified School District violated section 3543.5(a) of the Educational Employment Relations Act (the Act) by imposing reprisals against its employee, George de Tuncq, by removing him as chairman of the social studies department and transferring him to another school because of the exercise of rights under the Act.

As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

(1) CEASE AND DESIST FROM violating section 3543.5 (a) by taking reprisals against George de Tuncq because of his exercise of protected rights under the Act.

(2) TAKE AFFIRMATIVE ACTION TO:

(a) Make an immediate unconditional offer to de Tuncq to reinstate him at the beginning of the next semester to his former positions as chairman and full-time teacher in the Social Studies Department at Novato High School.

(b) Make de Tuncq whole for compensation lost as a result of being removed as departmental chairman, from the date of his removal to the date he is restored to that position or the date he declines such restoration. Payment on such losses shall include interest at the rate of seven percent per annum.

Dated: _____ By _____
Authorized Agent of the District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



NOVATO FEDERATION OF TEACHERS,
LOCAL 1986, AFT, AFL-CIO,

Charging Party,

Unfair Practice
Case No. SF-CE-473

v.

NOVATO UNIFIED SCHOOL DISTRICT,

PROPOSED DECISION

Respondent.

(7/23/81)

Appearances; Robert Bezemek (Bezemek & Bennett), for charging party Novato Federation of Teachers, Local 1986, AFT, AFL-CIO; Diana K. Smith (Breon, Galgani and Godino), for respondent Novato Unified School District.

Before; Fred D'Orazio, Hearing Officer.

PROCEDURAL HISTORY

On June 6, 1980, the Novato Federation of Teachers, Local 1986, AFT, AFL-CIO (hereafter Federation, NFT, or charging party), filed an unfair practice charge (SF-CE-473) against the Novato Unified School District (hereafter District or respondent) alleging that the District violated the Educational Employment Relations Act (hereafter EERA or Act),¹ sections

¹The EERA is codified at Government Code, section 3540 et seq. All references hereafter are to the Government Code unless otherwise noted.

3543.5 (a) and (b), by transferring a union activist in retaliation for engaging in protected activity under the Act. In addition, the charge alleged that the District refused to provide NFT, the exclusive representative of certificated employees, with information regarding the involuntary transfer of unit employees. The District, in its answer, denied both allegations. An informal conference was held on July 10, 1980. The matter was not settled and the formal hearing was conducted on September 10, 11, and 18, 1980. The parties filed briefs on November 18, 1980, and the case was submitted.

FINDINGS OF FACT

Protected Activities

George de Tuncq taught at Novato High School (NHS) for 23 years. He had a history of active involvement with the Federation. He was that organization's first president in 1969 and served one term. He was a negotiator under the Winton Act, the EERA's predecessor, and he engaged in other pre-EERA organizational activities. For example, he was once designated as a strike captain, but the strike never materialized.

Novato District teachers elected the Federation as their exclusive representative in 1976. Since that time de Tuncq has served as a grievance officer, a member of the grievance committee, and a building representative.² The following

²A grievance officer is a person who represents employees in individual grievances. A building representative is a

testimony by de Tuncq succinctly describes his status at Novato High School:

I am generally the one who people talk to about union matters there on the staff. We have had other people who have served as building reps to, you know, hand out literature and this kind of thing, but when somebody has a question under the contract they will come to me because I'm more familiar with the contract and legal process about it than any other member of the staff.

Russell Dreosch, a teacher in the District since 1958, testified that de Tuncq is "probably one of the most active if not the most active" union member at Novato High School.

In 1977, Barry Conner became the principal at Novato High School and has served in that position through the 1980-1981 school year. It was Mr. Conner who made the decision and took the necessary action to transfer de Tuncq in 1980. As the following incidents indicate, de Tuncq's protected activities regularly brought him into direct conflict with Barry Conner.

In the fall of 1978, a class size issue arose at NHS under the collective bargaining agreement. The issue involved the question of whether certain class sizes were in excess of those provided for in the contract. After informal discussions got nowhere, de Tuncq was authorized to file a grievance on behalf of teachers in the social studies department, de Tuncq then

person who conducts a broad range of organizational activities in the particular school, de Tuncq has simultaneously done both since 1976.

spoke to teachers in the English department about the same issue. According to de Tuncq, they declined to file a grievance because Conner had promised to reduce class size and they thought he was a "nice guy." At about this time Conner brought the class sizes into line with the contract. de Tuncq went ahead anyway and filed an institutional grievance on behalf of the Federation. He processed the grievance through the various steps of the grievance procedure, coming into direct contact with Conner at each step. Eventually, the case went to arbitration. de Tuncq was the sole witness for the Federation and Conner testified for the District. On January 30, 1979, an arbitrator ruled in favor of the Federation, finding that the District took too long to conform class sizes to the contract,

Another matter which brought de Tuncq and Conner into conflict involved the question of whether teachers, other than English teachers, should be required to teach basic language skills, i.e., spelling, punctuation, and writing. At a faculty meeting on August 31, 1978, Conner announced that part of the goals and objectives for all teachers during the upcoming school year would include teaching basic language skills.

A number of teachers who did not teach English complained to de Tuncq and he took up the issue. He first spoke privately to Conner and voiced a two-pronged objection: first, this requirement unilaterally altered the job and, second, added to the evaluation criteria in the collective bargaining

agreement.³ Conner explained that the public wanted basic education and teachers should provide it.

A number of meetings were held and memoranda exchanged, but the matter was not resolved. By the end of this process, de Tuncq had decided that he would not include the teaching of basic language skills as part of his goals and objectives. If Conner wanted to force the issue, he (de Tuncq) would grieve the matter. This was reflected in a note de Tuncq placed in his file on or about October 20, 1978. Conner eventually retreated from his initial position. The teaching of basic language skills by teachers, other than English teachers, would not be mandatory.

In the spring of 1980 these two men found themselves on opposite sides of another major issue. Prior to that time, absences and tardies had never been entered on report cards by teachers. At a January 16, 1980 faculty meeting Conner attempted to initiate this requirement at NHS, although it was not required at San Marin High School, the only other high school in the District. de Tuncq again objected. Because tallies from class to class and teacher to teacher are not

³de Tuncq raised additional questions about the meetings Conner had scheduled with teachers to discuss evaluation criteria. He objected to holding evaluation conferences during lunch hour because teachers were entitled to a duty free lunch period. Another objection was raised with request to holding group meetings after school to discuss evaluation criteria because the contract provided individual conferences.

always consistent, he argued, the requirement appeared to be an endless time-consuming matter. More importantly, it represented an increase in work for teachers.

To voice this position, de Tuncq and another teacher, Russ Dreosch, distributed a memo objecting to making this new duty mandatory. The memo also charged that the new duty wasn't negotiated. Quoting Carey McCarthy, NFT president, the memo stated:

... we should not start new patterns of work but should go along with past practices which in this case means using our discretion about using these spaces on the grade sheets.

On January 24, 1980, de Tuncq sent another memo to the faculty stating that this new duty "is not a 'must'."

On March 24., 1980, Conner evaluated de Tuncq as "needs to improve" in the area of recordkeeping. de Tuncq took exception to this evaluation. In a March 26, 1980 memo, de Tuncq openly defied Conner. He told him that the information regarding tardies and absences of his students was available. However, he refused to put it on report cards as Conner desired. If parents and administrators wanted to see it, de Tuncq told Conner, the material would be made available, but he (de Tuncq) saw no reason to put it on a report card. Conner never directly responded to this memo.⁴

⁴The record includes other examples of de Tuncq's protected activity. However, the hearing officer finds it

de Tuncq's Transfer

a. Reasons for the Transfer

On May 12, 1980 Conner first told de Tuncq that he was relieving him of his duties as department chairperson and thinking of transferring him out of NHS. During the meeting, Conner also said that both de Tuncq's attitude and his relationship with students was unsatisfactory. To support the latter allegation, he cited the cases of Mark Briggs and Linda Wilhelm as examples of situations which demonstrated de Tuncq's dislike of students.⁵ Conner also testified that he told de Tuncq that he had been at NHS for over 20 years and he needed a change. There was no discussion as to where de Tuncq would be transferred.

The reasons given de Tuncq for the transfer are also reflected in a memo Conner wrote to Paul Mobley, assistant superintendent, on the same day. In that memo, Conner described the discussion with de Tuncq as follows:

I explained to George that I was meeting the May 15 deadline, pointing out that I was giving strong consideration to giving him an involuntary transfer.

unnecessary to describe in detail all of these activities in order to show that de Tuncq was a union activist. The facts related in this part of the decision clearly support this point and more would be superfluous. Moreover, it is undisputed that the District was aware of these activities.

⁵The Briggs and Wilhelm incidents are discussed in detail below.

After a great deal of conversation, Mr. de Tuncq said that he felt that it was my job to explain to him what he was doing wrong. I stated that his relations with students and parents were such that I strongly felt something was wrong. I told him, specifically, he had been rude and abrupt with students and parents; that I had no other teacher that so many students and parents had come to me with so many complaints. On the other hand, Mr. de Tuncq felt that his Philosophy class was geared to more intelligent students and that those who were not in that category had not met the requirements of the course.

I also pointed out to Mr. de Tuncq that he was rude to fellow faculty members, both in faculty meetings and in curriculum council meetings. Mr. de Tuncq said that he felt that relieving him of his responsibilities as head of his department, and threatening him with a transfer was a punishment, used to make him change his way of teaching. I said that under no circumstances.- was it a threat; it was a procedure that I was following due to contract stipulations, because of specific student and parental complaints.

On May 28, 1980, Conner officially informed de Tuncq by letter of the transfer. The letter offered no reasons for the action, nor did it tell de Tuncq to what position he would be transferred. The letter stated:

The District posts lists of openings from time to time. You should watch for these notices and apply for vacancies that interest you.

At a May 30, 1980 meeting with Superintendent Ronald Franklin and Deputy Superintendent Paul Mobley, de Tuncq was told by Franklin that he would be placed in a permanent substitute pool until a position for which he was credentialed became vacant.

In September 1980 de Tuncq was assigned to Sinaloa Junior High School as a permanent substitute. During the hearing in this case, de Tuncq was again transferred, this time to San Jose Junior High School, and assigned to teach United States history and law. In order to make this assignment, the District rearranged the assignments of other teachers at San Jose Junior High School.

de Tuncq grieved the transfer. A first step grievance meeting was held during the first week in June 1980.⁶ According to de Tuncq, when asked for the reasons for his transfer, Conner repeatedly replied "you are being transferred for the good of the school." de Tuncq's testimony on this point is consistent with Conner's written version of the meeting which was found in a secret file he kept on de Tuncq. Conner wrote:

Mr. de Tuncq stated that he had been relieved of his department chairperson duties prior to May 15, and cited my conversation with him, that it had to be done if I were to give him an involuntary transfer at the conclusion of the present school year. I agreed that the above conversation had taken place. Mr. de Tuncq also said he had received my letter requesting an involuntary transfer.

Mr. de Tuncq asked three questions concerning the involuntary transfer. The

⁶The meeting was attended by Conner, de Tuncq, James Ross, vice principal, and Carey McCarthy, NFT president. The grievance was pending as of the time of hearing. The contractual grievance procedure does not provide for binding arbitration. Thus, no question of deferral under section 3541.5(a) is raised.

three questions all centered around the reasons he was to be transferred. To each of these questions, I replied "For the best interests of the school." Mr. de Tuncq then posed two questions, asking if his union work was causing the above "reprisal." To both of these questions, I answered, "There are no administrative reprisals."

Mr. de Tuncq then asked if the problem could be settled at Level I of the grievance procedure, to which I answered, "No."

The meeting ended at this point.

The meeting was short. Thus, as of the time of his transfer, de Tuncq was given few specifics as to the reasons for the action.⁷

During the course of the hearing, Conner testified in more detail as to the various reasons which prompted the decision to transfer de Tuncq. According to Conner, de Tuncq's relationship with students and parents was poor, and he regularly carried a lighter teaching load than other teachers, implying that students were unwilling to remain in his class. Conner said students complained about being confused and not knowing the requirements in de Tuncq's courses.

Another reason for the transfer was Conner's opinion that de Tuncq "needed a change" because he had become "locked into a system." According to Conner, a teacher becomes "locked in"

⁷Also, at the May 30 meeting with Ronald Franklin, superintendent, and Paul Mobley, deputy superintendent, Franklin said he didn't know why de Tuncq was being transferred and "assumed" it was due to parental complaints.

when he or she has taught the same courses for an unspecified number of years, and begins to act to protect "their personal territory." Conner said that de Tuncq's personal territory was smaller classes with more advanced students because he had no patience for "slower kids." Conner acknowledged, however, that other teachers also prefer to teach advanced students.

Prior to the transfer, de Tuncq was never told by Conner that he had been at Novato High School teaching the same courses for too long a period, nor was he ever told that Conner felt he was "protecting his territory." Conner testified that he told de Tuncq within the last year-and-a-half that he had no patience with slower learners, but de Tuncq's evaluation for this period reflects just the opposite.

Finally, after being recalled as a witness, Conner further testified that de Tuncq's transfer was "partly" based on his grading policies. This was the first time this had been expressly offered as a reason for the transfer. According to Conner, there "seems to be confusion about how Mr. de Tuncq arrives at a grade." de Tuncq's teaching abilities, however, played no part in the decision to transfer.

b. de Tuncq's Service at NHS and His Written Evaluations

George de Tuncq taught at NHS for approximately 23 years. He had been the chairperson of the social studies department

since 1967.⁸ He has the most seniority of all social studies teachers in the department.

Barry Conner was the principal at NHS for the three school years preceding the hearing. In this capacity, he had ample opportunity to observe de Tuncq's performance and evaluate him.⁹ de Tuncq's official evaluations for this period indicate that Conner had high regard for all aspects of his teaching.

On March 31, 1978, Conner evaluated de Tuncq "one-effective" in all areas where numerical ratings are used. In addition, Conner wrote the following about de Tuncq:

George has shown a professional posture throughout the 1977-1978 school year. He has followed through on all assignments as department chairman.

⁸de Tuncq was unanimously elected to this position in periodic elections by the five other teachers in the social studies department. After an election the principal appoints the chairperson. de Tuncq received \$375.00 for his services as chairperson during the 1979-80 school year. de Tuncq, who had taught at Novato High School for 23 years, could not recall another department chairperson being relieved of that assignment.

⁹In order to fully understand the significance of these evaluations, one must be familiar with the evaluation system in the District. Teachers are numerically rated in three main areas: (1) Instructional Competence, (2) Classroom Management, and (3) Professional Qualities. Each of these areas is broken down into several factors. Instructional competence is broken into relations with students, teaching on the students' level, instruction procedures, and knowledge of subject matter. Classroom management is broken into classroom control, care and appearance of classroom, and reports and records. Professional qualities include cooperation with staff, professional

During the year, George has successfully run the Marin County Government Scholars Program that included the coordination of teachers, students and buses. (Sic)

George was asked to work at the district level for two periods in the Spring semester.

He has helped with the articulation of the K-12 Social Studies program, with emphasis on grades 7-12.

Dr. Rothe has indicated George's work is satisfactory.

Approximately one year later, on March 19, 1979, Conner again evaluated de Tuncq "one - effective" in all areas where the numerical rating is used. In addition Conner wrote that de Tuncq was "professional in his approach to classes," and his recordkeeping was "excellent." After outlining de Tuncq's "methodology" and criteria for evaluating students, Conner concluded by saying that "de Tuncq follows school policy and is thorough in the classroom."

de Tuncq received a similar evaluation from Conner on March 24, 1980, except he slipped to a two, - "needs to improve", in record keeping.¹⁰ Conner's other written comments recognized

self-improvement, relations with parents, and interest in extra-curricular activities. The numerical ratings are "one - effective; two - needs to improve; and three - not observed." In addition, the evaluation form includes an area where the evaluator may enter written comments about the evaluatee.

¹⁰This was in response to de Tuncq's refusal to include absences and tardies on report cards. On this subject, Conner wrote that de Tuncq "failed to follow instructions, per the principal's request."

that de Tuncq "has successfully met his stated goals and objectives" for the 1979-80 school year.¹¹ Conner continued: "By using a variety of teaching methods Mr. de Tuncq has successfully reached at least 85% of his students," and "he encourages and gets excellent student participation in discussion." Conner further noted that de Tuncq had made "good-to-excellent" progress in other teaching areas. This evaluation concluded with the following comment:

The wide variety of teaching methods and evaluation of students gives students of all intellectual abilities an opportunity to pass Mr. de Tuncq's classes.

Mr. de Tuncq needs to improve his recording of absences and tardies for report card purposes. He failed to follow instructions per the principal's request.

Mr. de Tuncq attended a sex-equity conference, and supported our students by attending a lacrosse match and a student musical presentation.

Mr. de Tuncq has excellent organizational skills, as evidenced by the neatness of his room, and the clarity with which he gives assignments.

There was no evidence presented that de Tuncq ever received an unsatisfactory evaluation. None of these evaluations included a student/parent complaint about de Tuncq. Conner testified that:

¹¹The March 24, 1980 evaluation was based on classroom observations by Conner on March 19, 20, 1980 and December 4, 5, 1979.

I usually keep a record [of such complaints]
so that I can go to the teacher and discuss
it with him if it's at all serious.

He also said that some complaints of a less serious nature may be informally resolved by talking to the teacher or the complainant. For example, a complaint about a grade, according to Conner, would be disposed of by asking the teacher to show how he arrived at the grade.

During his tenure at NHS, de Tuncq, who is a member of the National Council for Social Studies, was active in the social studies department. His unrebutted testimony indicates that he introduced a psychology course to the department in 1972 or 1973, and a philosophy course in 1974 or 1975. After his return from a fellowship at Carnegie Mellon University, he introduced courses in behavioral science. He also introduced a humanities course to the department. In addition, he caused the history course to be split into analytical western civilization and analytical United States history. Similarly, though he did not teach American democracy, he caused that course to split into civics and current problems, such as poverty, foreign policy, etc.

Conner testified that he was unaware of any "innovations" which may have occurred in the social studies department over the past five years as a result of de Tuncq's efforts, and he did not ask de Tuncq if he had done anything along those lines. However, de Tuncq's testimony indicates that he has been innovative.

During the 1979-80 school year NHS was up for its evaluation and accreditation by an outside committee of school administrators. This committee commended the social studies department, which was under de Tuncq's chairmanship, for the variety of courses offered. de Tuncq testified that:

On that occasion Mr. Conner was quite happy to take credit for the social studies program that we had created.

In addition, although the contract calls for a desired maximum of three preparations for each teacher, de Tuncq voluntarily carried from three to five preps, thus enabling the department to offer a wide variety of courses.

c. de Tuncq's Relationship with Parents and Students

1. Parent and Student Complaints Received Between March 24, 1980 and May 12, 1980.

Conner stated that his March 24, 1980 rating of "one - effective" in "relations with students" and "relations with parents" was "an accurate reflection" of de Tuncq's performance in that area up to that time. He also testified that this rating, with some exceptions, reflects performance in prior years. Conner's decision to transfer de Tuncq was prompted by the number of complaints about de Tuncq between March 24, 1980, the date of his last evaluation, and early May, the approximate time he decided to transfer de Tuncq. Conner admitted the "inconsistency" between de Tuncq's past evaluations and the current allegation that he has problems with parent/student

relationships. Conner explained that it would have been appropriate for him to correct this inconsistency by issuing de Tuncq another evaluation reflecting the complaints received after March 24. However, he failed to do so.

Students and parents testified as to the complaints they made after March 24. Since these were the complaints that prompted Conner to act, they will be considered in detail.

Mark Briggs

de Tuncq was Mark Briggs¹ teacher for personal philosophy during the 1979-80 school year. He received a D at the end of the third quarter.¹² As is the case with most of the complaints received between March 24 and May 12, the third quarter grade formed the basis of Briggs' complaint. In addition, Briggs complained that de Tuncq would not discuss his deficiency notice when questioned about it in view of the entire class.¹³ de Tuncq stated that he refused to discuss individual grade matters in such a forum.

¹²The school year at NHS is divided into semesters. Each semester is further divided into two quarters. Thus, the first and second quarters make up the first semester and the third and fourth quarters make up the second semester. Students receive grades at the end of each quarter, but these grades do not appear on transcripts. The only grades that appear on transcripts are those which are given at the end of each semester. For example, grades for the third and fourth quarters make up the final grade for the second semester.

¹³A deficiency notice is a written assessment of a student's standing in a class. It is usually issued when a student is doing poorly.

The criteria for grading and the grading procedure utilized by de Tuncq were as much a part of the complaint as was the actual letter grade, de Tuncq's grading system in philosophy consisted of assigning points based on oral participation, attendance, tardies and optional written work. Briggs contended that he would have received a B rather than a D if he had not lost points for being tardy.

de Tuncq testified that Mark Briggs received zero for the written assignment because his project was turned in late, even though the due date had been announced early in the semester. Briggs conceded that the project was turned in late. de Tuncq further testified that he told Briggs the third quarter grade was not final, and the written project would be counted toward the final grade at the end of the fourth quarter.

Briggs also received a zero in punctuality due to his large number of tardies, incurred as a result of Briggs¹ morning swimming practice at a San Rafael pool. Briggs apparently had trouble arriving on time for his first period philosophy class at Novato High School after swimming practice. de Tuncq informed Briggs that athletes should be treated the same as other students and to ignore the tardies in this case would afford Briggs preferential treatment, something de Tuncq declined to do.

The explanations for Briggs¹ grade were communicated by de Tuncq to Mr. Gordon Briggs, Mark's father, at a meeting on April 15. de Tuncq also told Mr. Briggs that he had three

alternatives with regard to Mark's grade: Mr. Briggs could issue Mark a grade, ask Principal Conner to change the grade, or write a letter to "whomever you wish." There is no evidence that de Tuncq was discourteous to Mr. Briggs during this meeting.

Gordon Briggs reduced his version of this meeting to writing in an April 17 letter to Superintendent Franklin, and sent a copy to Conner. The letter was highly critical of de Tuncq and his grading criteria. Specifically, Briggs criticized de Tuncq's practice of grading based on attendance for punctuality, contending essentially that if Mark had not been graded on punctuality he would have received a B for the third quarter rather than a D,

In a subsequent letter Gordon Briggs asked de Tuncq to change Mark's grade to a B. de Tuncq discussed this matter with Barry Conner, and informed Mr. Briggs by letter that Conner refused to do so. Mark Briggs went on to get a final grade of B in the course by virtue of work done in the final quarter.

Rebecca Lee Bradley

de Tuncq was Rebecca Lee Bradley's teacher for American government and humanities during the 1979-80 school year. Although she voiced several complaints,¹⁴ her major

¹⁴Her first complaint was based on a failing grade. She

dissatisfaction was based on de Tuncq's classroom conduct.¹⁵

The nature of this complaint is best described by her testimony.

Q. (By Ms. Smith) Have you ever seen Mr. de Tuncq ridicule people in class?

A. Yes.

Q. Could you give an example of that ridicule?

A. Well, it wouldn't be something, I have no idea what was in his mind, but I don't think it is something directly destructive to, you know, like the person, you know, like I think you're terrible and you're awful. But, you know, he's made little comments all the time. Nothing really extremely serious like I think you should be dead.

On cross-examination Bradley further testified about the nature of her complaint:

Q. Okay. What little comments did Mr. de Tuncq make?

A. That's hard, there's a lot of comments that teachers make. I really cannot say. He said like, now you're testing my mind here, if you did, okay, one thing in his classes, the class took participation in discussion. So if you said something he'd say, no, I

received letter grades of B in American government and F in humanities. She did not object to the grade of F. Bradley admitted to not fulfilling course requirements during the third quarter in the humanities course, but testified that she fulfilled them during the fourth quarter. Since the fourth quarter grade was issued after Conner took action against de Tuncq, Bradley's dissatisfaction with that grade need not be addressed.

¹⁵Rebecca Bradley was the only witness who testified in any detail about de Tuncq's conduct in the classroom.

don't think you're right, you have the whole thing wrong or something like that, or -

HEARING OFFICER: You have what? I didn't hear that.

WITNESS: You have it wrong. I feel something different or, I don't know. Teachers make comments all the time.

Q. (By Mr. Bezemek) Well, would -

A. They weren't very harsh comments. The -

Q. He would say that you're wrong, it should be this way or I feel it's differently, is that what he was saying?

A. Yeah.

Q. He was disagreeing with the students' opinion, is that right?

A. I think he was purposely doing that so the people in the class would look a little harder at the situation.- you know.- answer better questions.

Q. Asking critical questions?

A. Yeah. He was just doing that so they would, you know, speak out more against it.

Bradley voiced only one specific complaint regarding a comment made by de Tuncq in class. When asked by District counsel for an example of an offensive comment by de Tuncq, Bradley said:

A. All right. It was in my American government class and I had just gotten into class and I sat down. And I had been talking and he was sitting in his desk and there were two men, two of my friends in front of me and they looked behind me and I smiled and then a friend of mine named Annette turned around and smiled. And so, he told us to be quiet and then he said I know not, I don't know how

hearings go but this is probably not word for word, but it had something a lot to do with this, he said girl, ladies have power of men or something like that and do not distract the men in the class, I, that's just one thing I remember. I remember at the time I thought about it for a long time.

Q. Was that statement made in a humorous tone of voice, if you recall?

A. Sort of, I guess it would be.

Q. Did it offend you?

A. It offended me and it offended I know Annette and a couple of girls in the class because they didn't think so, that, you know, girls automatically have power over the men.

Q. So when you say offended do you mean embarrassed or what kind of other word would you use?

A. Well, it embarrassed me, I know that.

de Tuncq recalled this incident as follows:

Q. Do you recollect that?

A. Oh, yes. On that, Boatwright and Linda, Becky Bradley sat together all during the course, I would separate them periodically, but this was last period in the day and their major activity in the course was to flirt with the boys as they came in, they would, you know, draw them over to their corner where they were. And I normally would have to start class by breaking up that group and in telling them to, you know, you go sit there and you, and it was, there were usually about three or four fellas I'd have to say, now, you go to that side of the room and so on. She took exception to my calling attention to the fact that I had to do this over and over again. So, that I guess is a reprimand of some kind to tell them to leave the boys alone.

Bradley also testified that class assignments by de Tuncq were "confusing." On this point the testimony indicates the following, de Tuncq had distributed written instructions about a project in his humanities class, a course designed to study and compare civilization in Athens during 450 B.C., Florence during 1450 A.D., and modern New York City. These instructions gave some suggestions as to the broad range of subjects a student might choose for his or her project. They concluded with the following statement:

See the instructor and let him know what you are planning so that you can be allotted class time and also not waste time in an area that will not be suitable.

Without consulting de Tuncq, Bradley chose as her topic the slaughter of the baby harp seals during the mid-1970's in the St. Lawrence River. Neither her choice of a topic, nor the quality of her final project, impressed de Tuncq. He therefore gave Bradley a low score which contributed to her grade of F.

Gloria Bradley, Rebecca's mother, contacted de Tuncq through Conner about Rebecca's grade in the Spring of 1980. She expected that Rebecca would do much better and thought the grade was unfair. At that time, she spoke with de Tuncq on the telephone, then they met and discussed Rebecca, and de Tuncq again spoke with Mrs. Bradley at a later date. There was no evidence presented that de Tuncq was in any way discourteous or unprofessional during these three conversations.

During the 1979-80 school year de Tuncq issued written reports on Rebecca's progress, but never heard again from Mrs. Bradley. The final grade in humanities was given in June, at the end of the 1979-80 school year, but it wasn't until September of 1980, approximately 3 months later, that Mrs. Bradley lodged a protest about Rebecca's grade.

Conner did not discuss any of the foregoing incidents relating to Rebecca Bradley or her mother with de Tuncq.

Linda Wilhelm

Linda Wilhelm received an F from de Tuncq in personal philosophy for the third quarter of the 1979-80 school year, de Tuncq testified that the F was due to her high number of tardies and her failure to submit an evidential file* Allegedly Wilhelm didn't understand exactly what an evidential file was or what was required in the course, even though these matters had been communicated to students by de Tuncq in writing early in the course.¹⁶ de Tuncq counseled her that she would have to meet the requirements of the course if she wanted to pass. During the fourth quarter Wilhelm thought she had improved, so she asked de Tuncq whether her deficiency notice was still

¹⁶de Tuncq distributed handouts at the outset of the personal philosophy course which stated the course requirements and explained what was meant by the evidential file. The handout was one single-spaced typewritten page and explained the evidential file in some detail.

valid. According to Wilhelm, de Tuncq responded that he had seen no "apparent improvement."

As a result of Linda's third quarter grade she received a deficiency notice in the course. This prompted Linda's mother, Gail Wilhelm, to write a letter to de Tuncq. In an April 10, 1980 letter, Mrs. Wilhelm asked de Tuncq what Linda needed to do to improve her standing in the course and requested weekly reports from de Tuncq on Linda's progress. On April 14 de Tuncq responded by the following letter:

Linda is not meeting the requirements in the Philosophy course.

I have included copies of the requirements so that you may understand what it is that she must do to get a better grade. From your letter it seems to me that she has not fully informed you of what she must do.

She failed to hand in an Evidential File for the first quarter.

She also failed to qualify for the points for being on time to class. Twenty-three students received the points, five did not.

Linda is enrolled for credit in an elective course. She needs to meet the requirements to get credit.

I look forward to an improvement in her academic standing.

As for the weekly reports, de Tuncq testified that the course did not lend itself to this kind of reporting because there were no weekly tests or written assignments. Since Mrs. Wilhelm's letter had led de Tuncq to conclude that she didn't

understand this or what the course was about, he attached the course requirements and course description to his letter.

Mrs. Wilhelm, after a meeting with Conner, set up an appointment with de Tuncq. She asked him if it was possible for Linda to pass the course and get credit. de Tuncq responded that it was. His response angered Mrs. Wilhelm because, according to her, it was totally different from what she believed de Tuncq told Linda earlier in the day, an apparent reference to Linda's testimony that de Tuncq said he had seen no improvement since the third quarter. In a later meeting with Conner, Mrs. Wilhelm informed him of what she thought was an inconsistency in de Tuncq's statements.

Another complaint raised by Mrs. Wilhelm involved her testimony that Linda was upset after an earlier meeting with deTuncq. During the meeting, according to Mrs. Wilhelm, de Tuncq allegedly "degraded" Linda and made her "grovel." Mrs. Wilhelm was not at that meeting. Linda did not testify about this meeting in the same way, nor did de Tuncq. There was no testimony, other than Mrs. Wilhelm's, that would support the accusation that de Tuncq "degraded" Linda Wilhelm or made her "grovel."

After a second meeting between Mrs. Wilhelm and Barry Conner, Linda dropped the course on May 9, 1980 and received no mark for the fourth quarter.

Barry Conner discussed the Wilhelm situation with de Tuncq.

de Tuncq's testimony as to this meeting with Conner is as follows:

Q. Did Mr. Conner come to you and discuss with you any complaints he had received about your treatment of the Wilhelm child? Either your grading of her or the course requirements?

A. No. He did say that Mrs. Wilhelm had talked to him and felt that if she did come in later and she did talk to me and I reiterated verbally what I'd said in my letter that Linda would have to meet the requirements in the course and asked her if she had any questions about them and she said not. And that left very little to say, and so after a few pleasant generalities she left and then Mr. Conner did say to me that Mrs. Wilhelm felt that my answers had been short. And I asked him, what does that mean? And he said, well, to me it means that you were rude. We didn't argue about anything. she asked about the course, I explained it, and explained to her what Linda would have to do in order to pass the course and that was the end of the conversation. It was quite short and very innocuous.

Q. When did that take place?

A. Well, it was after April 14. I think it was about the time at which Linda decided to drop the course. There was a flurry of students who dropped philosophy following Mark Briggs confrontation with me in class about his deficiency notice.

Maureen Slevin

Maureen Slevin received an F in de Tuncq's personal philosophy class for the third quarter of the 1979-80 school year. Slevin did not hand in an evidential file. She was awarded 65 out of a possible 100 in oral participation, and no

points for attendance. According to de Tuncq, Slevin had no interest in the class.

Slevin testified that she went to Mr. James Ross, assistant principal at Novato High School, and "proceeded to talk to Mr. Ross and see if I could get out of the class because I needed it to graduate from high school." She testified that she had received a poor progress report, and thought it "unfair" to grade students only on class participation under the system utilized by de Tuncq. This essentially was Slevin's reason for dropping the course.

Another complaint raised by Slevin in her written statement¹⁷ was that "when it came time for the third quarter to end Mr. de Tuncq went around the room looked at each student, and from the top of his head gave him a number of points for class participation. To some he gave high points when I have never heard these people say a word. I don't think this is a very accurate way of grading."

de Tuncq explained his method of assigning points for oral participation as follows:

Q. How do you decide whether to award certain points for oral participation to one student as opposed to another?

¹⁷ROSS asked Slevin for a written statement of her experiences in de Tuncq's class. Slevin drafted the statement and gave it to Ross, who presented it to Conner without discussion with de Tuncq.

A. Well, oral participation in the philosophy course means, first of all, that you're there to hear what's going on. Then it also indicates that I've observed you listening as, you observe students in the classroom by the mid-term, halfway point, you've observed them for about 45 hours. And you get to know students pretty well, they have general patterns, there are some people who listen and never say anything but it's obvious that they are following what's going on all over the room, they're interested. There are other students who may be trying to work on their algebra which is due the next period, for sure they are not with the course. Then there are some students who will simply repeat back in different words what some other student has said. There are students who will rephrase something out of the book. There are, one way you always start a discussion, or one good way to start it is to get people to simply recall what they read. And there are some students who take part only at that level and simply say yes the book said this that and the other thing. And there are other students who will see inferences and introduce ideas and then finally, there are students who will synthesize what they have heard in class, what I've talked about, what they've read in the book and indicate that they have found out something for themselves. And sometimes it's only of personal value and other times it's something that has real value to the other students. So, that by the time I've observed these students for 40-45 hours, I feel pretty good about making an assessment. The points go by fives, just because it's easier to add up in the grade book, and I don't give anybody less than, say, 25 points out of the 100 possible and generally 95 is about as high as you go. It's a principle in measuring if you're running on the end of the scale you're not measuring, you have, that indicates that you ought to have a longer scale. So the range runs from about 25 to 95 points.

Q. Do you assign the grades then arbitrarily?

A. No, they're based on my observation of the students.

Slevin dropped the class on May 7, 1980 and received no mark. She worked as Ross' student assistant and received enough credits to graduate. At the time Slevin dropped the course de Tuncq signed the necessary papers, but he never received a copy of Slevin's written account of her experience in his class. He did not see Slevin again or hear any of these complaints until she appeared to testify at the hearing. Connor and de Tuncq had no communication regarding the Slevin incident. There is no evidence that Ross ever approached de Tuncq about the substance of Slevin's complaints.

Deborah Hagan

de Tuncq was Deborah Hagan's teacher for personal philosophy during the 1979-80 school year. She testified that she had a "personality problem" with de Tuncq and considered transferring "about a week-and-a-half after the course began." She decided to stick it out, however, and received a D for the third quarter. The essence of Hagan's complaint is that she disagreed with her grade and with de Tuncq's explanation of the grade. She testified as follows:

Q. (By Ms. Smith) Did you ask Mr. de Tuncq for an explanation of the D?

A. I went to him after class one day after I had received the D and I told him that I didn't think I deserved a D in his class. He said thank you for your opinion and he walked away and left the class.

Q. Did you talk to Mr. de Tuncq again about this matter?

A. I went home that afternoon. I was very angry, and so the next day after class again, I went up to him and asked him why I got a D and he handed me some charts with a bunch of markings on it and he said that this is why you got the D and he didn't really explain anything to me. He told me that if I fulfilled the requirements of the course I could get a better grade.

Q. Okay. Did you know what the requirements of the course were?

A. We received a dittoed out sheet for all his courses and it was very general and so, I guess, I was aware, yes.

Q. Do you recall what those requirements were?

A. Being on time to class, being present at the class and filling the requirements oh no, that wasn't it, participating orally in the class and turning in an evidential file which was an optional requirement.

In Hagan's view she completed all assignments and deserved a higher grade.

Hagan's second complaint involved her attempts to schedule a meeting between her mother and de Tuncq. According to Hagan, de Tuncq agreed to meet with her mother during second period, de Tuncq's preparation period. When she approached de Tuncq at the beginning of her first period philosophy class to tell him that her mother would be there during second period, de Tuncq said that he didn't have a meeting scheduled. Hagan further testified that de Tuncq said she would be given a tardy if she left the class to call her mother. Hagan nevertheless did so

and cancelled the appointment. There is no evidence that she was marked tardy. Both Deborah Hagan and her mother complained to Barry Conner that day about this incident.

de Tuncq described the missed appointment incident as follows:

Q. Did you miss an appointment that had been scheduled by Deborah Hagan?

A. No.

Q. With her mother?

A. I did not have an appointment with Mrs. Hagan. Debbie had asked me about an appointment for her mother and I said that I would, that I have second period prep and that I would be happy to talk to her and that we could schedule it any second period. But apparently Debbie took that as meaning that her mother could walk in any day second period and I would be there. And, of course, what happened was she walked in and I found that the counselor had already scheduled a parent, counselors do this they know when our preps are, and so I had to tell Debbie that I was terribly sorry but could her mother come back the following day and I think that was when we did have, I'm not sure if she came back the following day. She came back the first opportunity she had, I didn't have anything else that was a conflict and so we did finally talk.

Q. When you say a counselor had scheduled a parent, do you mean to say you had another parent conference at the same time?

A. Yes.

Q. Did Mr. Conner discuss with you the question of whether or not you had missed or failed to keep an appointment with Deborah Hagan's mother?

A. No.

Hagan's next complaint stems from comments de Tuncq made during a meeting with her mother. According to Hagan, de Tuncq said she was not "college material" and "he would not waste his money sending me off to school." Deborah and her mother met with Conner after their meeting with de Tuncq and told him of their version of the meeting. de Tuncq described the conversation about Hagan's future in college as follows:

Q. Did you tell Deborah Hagan that she was not of college material and that her mother shouldn't waste money on her?

A. Well, no, that wasn't quite what I said, but the subject was in the conversation.

Q. Let me ask you this, how did the subject arise?

A. The subject arose because Ms. Hagan asked me for my estimate of Debbie as a college student and this was at the end of a conversation that Debbie, her mother, and I shared in office and Debbie's mother wanted to know about the course, how she was graded, what she hadn't done, why she'd received the low grade, and so on. But Debbie kept interrupting us and finally her mother, who I assumed as a parent would tell her to sit down and be quiet, wouldn't and finally Debbie ran over to me as I was trying to answer her mother and I told, I said Debbie sit down and be quiet. And her mother didn't object and we went on and finished and by the end we were getting along so well that she said well, what do you think about Debbie as college material and I said well, only based, I've only had her in this one course. And that at this point she doesn't strike me as being mature enough to really be able to do academic work at the college level very well and I recommended that rather than sending, Ms. Hagan was talking about a university like

Berkeley and I said well, that I really recommend that she try Debbie first of all in a good junior college setting where she can transfer her units and to see how seriously academic Debbie is. And what I said was that it costs nothing to have her stay at home and go to either IVC or College of Marin. But based on what I'd seen that I would recommend that course rather than the high cost of a school like Berkeley for her opening undergraduate work.

Conner described the meeting between de Tuncq and the Hagans in his May 12, 1980 letter to Superintendent Frankin as follows:

Mrs. Hagan, mother of Debbie Hagan, requested a meeting with me on the morning of May 9, in connection with Debbie's class with Mr. de Tuncq.

Mrs. Hagan indicated that they had just met with Mr. deTuncq and that he had received them politely. Debbie felt that there was a clash of personalities between she and Mr. de Tuncq, but would be doing all of the course work, as outlined by Mr. de Tuncq, for the remainder of the semester.

Mrs. Hagan did say that Mr. deTuncq indicated that Debbie could do a paper to be turned in, that would meet some part of the course requirements. Mrs. Hagan further indicated that Mr. de Tuncq would not, however, grade and return Debbie's paper, because he felt that this paper could be used again by other students, if it was returned.

Robin Hettrich

Robin Hettrich was enrolled in de Tuncq's humanities class during the 1979-80 school year. She received a D for the third quarter. Hettrich handed in an evidential file, but received no points for attendance because of frequent absences due to illness during the quarter. Hettrich thought her grade was

unfair because she "worked really hard in the classroom." Upon her return to class she and de Tuncq discussed making up the missed classes, but de Tuncq said there was nothing he could do about it. According to de Tuncq, she simply "missed the course."

At a later date, Hettrich received an unfavorable progress report which she interpreted as an indication that she would not pass the course if she did the same amount of work in the fourth quarter as she did in the third quarter. At that point Hettrich stopped attending classes. After 9 truancies, she was called in by her counselor who suggested she discuss the matter with de Tuncq. She did, but according to Hettrich they could not "work things out." She received "no mark" for the fourth quarter. Hettrich dropped the course on May 22, 1980, after Conner had announced de Tuncq's transfer. In fact, Conner admitted that the entire Hettrich matter did not come to his attention until after May 22.

d. The May 12, 1980 Memo to Superintendent Franklin

On May 12, 1980 Conner sent a memorandum to Superintendent Franklin describing the "recent incidents concerning George de Tuncq." This letter included a short description of all those complaints described above, except for those involving Slevin and Hettrich. In addition, the letter outlined other complaints as described below.

The memo cited a complaint by Susan Kirkwood, a student in

de Tuncq's personal philosophy class. Conner described Kirkwood's complaint as follows:

According to Susan, there have been no assignments nor tests in this class. Mrs. Kirkwood indicated that Mr. de Tuncq said that his class was for brighter students. After a lengthy conversation between Mr. de Tuncq and Mrs. Kirkwood, Mr. de Tuncq stated that Susan must pass the final in order to pass the course. At the same time, Susan felt that she has never been informed of the course expectations until "recent weeks." I encouraged Susan to meet all of the course requirements, as outlined by Mr. de Tuncq.

As evidenced by the March 24 evaluation, Conner was well aware of the "clarity with which [de Tuncq] gives assignments." And he never suggested any modification or in any other way questioned the way de Tuncq assigned work. Neither Susan Kirkwood nor her mother testified at the hearing. Kirkwood dropped the course on May 12. Her grade at the time was an F. She had turned in no written work, had low attendance, and had only average oral participation. Conner never discussed the Kirkwood matter with de Tuncq.

The same memo included a reference to Catherine Barsch as one of the "recent incidents" concerning de Tuncq. This "incident" was described in the memo as follows:

Catherine Barsch received a progress report from Mr. de Tuncq, dated April 22, 1980, indicating that she is near failing, according to her counselor, Dr. Eddy. Mr. de Tuncq's statement was as follows: "Based on Catherine's performance in the first part of the course, I estimate that she will not

do enough work of sufficient quality to earn credit in the course."

As Catherine needs the units from this course to graduate, Dr. Eddy encouraged her to remain in the class and strive for a passing grade. Her overall grade point average at this time is 3.50.

Barsch did not testify at the hearing. Conner never discussed this student's situation with de Tuncq.

Conner described an incident involving Sharon Silva as follows:

On Monday, May 12, Mrs. Dress honored a request from Sharon Silva to drop Mr. de Tuncq's class, with a grade of "No Mark," stating the following reason(s):

"Mr. de Tuncq either ignores me when I try to talk (a requirement of the class) or informs me I can transfer out and then offers to flunk me for not speaking."

Sharon's mother, Mrs. Delores Silva Lees, signed the application for a program change, stating, "She can transfer out."

de Tuncq testified that he could not recall "her being a very eager participant" in class. Neither Silva nor her mother testified at the hearing. Conner never discussed the Silva matter with de Tuncq.

e. Other Parent and Student Complaints

In support of the District's position that de Tuncq was transferred due to his poor relationship with students and parents, Barry Conner recounted three previous incidents. Each of these occurred prior to March 24, 1980, the date de Tuncq received his final written evaluation from Conner.

Conner testified as to two incidents regarding Diana Ziss. In November 1978 de Tuncq allegedly refused to show Ziss her evidential file. Conner wrote a memo to de Tuncq outlining the problem and asking de Tuncq if he could help clarify the matter. The second incident involving Ziss stemmed from de Tuncq's offer to change Ziss' grade from an F to an A during a meeting with the student and her parents. de Tuncq said he made the offer in "exasperation." After several meetings and letters, the matter was dropped and the grade not changed.

Another incident referred to by Barry Conner in his testimony involved John Cheney. Cheney had been in several other schools before enrolling at Novato High School at mid-term. Conner wanted to place Cheney in de Tuncq's class but de Tuncq resisted, saying it was unfair to the student because he had been in a different program and would be behind if placed in this particular class. However, de Tuncq did not refuse to enroll Cheney in his class. Barry Conner then decided to place Cheney in another class. The Cheney incident occurred in October 1979. There was no evidence presented that Cheney or his parents complained about the incident.

Conner also identified Tracy Morrill as a student who complained about de Tuncq. Near the end of the 1978-79 school year Morrill asked to be excused from her remaining studies so that she could visit relatives out of state. Her counselor circulated a memo to Morrill's teachers asking if her leaving

early would present a problem to her graduating. Graduation was to occur in June upon her return to California. Along with Morrill's other teachers, de Tuncq signed the request, thus indicating that it would be all right for Morrill to leave. At the end of the term Tracy Morrill returned from out of state and was informed on the morning of her graduation ceremony that she would not be permitted to graduate because she failed de Tuncq's course. Morrill vigorously complained to both Conner and de Tuncq. Various counselors in the school also complained to de Tuncq about his actions. de Tuncq testified that his signing the release was an unfortunate mistake. If asked, he would have changed the grade so that Morrill could have graduated with her class,

f. de Tuncq's Grading and Drop Policies.

These complaints call into issue de Tuncq's grading policy, especially as it relates to attendance. In addition, they involve de Tuncq's drop policy.¹⁸ de Tuncq described his drop policy as follows:

Q. Can you explain what your drop policy is?

A. My drop policy for all students is that at any time if a student wishes to withdraw they may withdraw and that they will receive no mark on their transcript. And the purpose behind this is that I think that no student should be forced to take an F if they want

¹⁸Both policies are described in handouts to students at the beginning of a term.

to maintain a rather clean looking transcript, I don't object to their simply withdrawing because they don't get credit, in effect, what they do if they stay in a class for a long time and then withdraw is they've simply spent their time. Students in our high school are required to take 160 units in order to graduate.

.

There's a pattern in which students take courses. The ideal at Novato High School in your three years is to load up during the first two years so that when you're a senior you only have to go to school half a day. And students prefer, they have this extra time, they could spend more time, it's easy to get 160 units within three years. Many of them prefer to say oh, what the heck, you know, I'll just drop that one and make it up later. And as long as this is the way the requirements bear to, the time that they are in school and the faculty has said that they would like to have the requirements raised, you get a pattern where students want to withdraw without penalty and just say I'm going to leave this class. And I don't object to that given the arrangement of our school.

Students who dropped a course could receive a "grade to date" or a "no mark." Students only receive credit for the grade at the end of a semester. The first quarter grade in a semester carries no credit.

de Tuncq testified that each of the five other teachers in the social studies department at Novato High School have different variations of a drop policy. He described each teacher's policy. When asked if other teachers in the social studies department permit students to drop classes without receiving a grade, Conner replied that he did not know, and he

never made any attempt to find out. According to Conner, a teacher has the prerogative of letting a student who is receiving a D or an F drop a course. Apparently no single policy is in effect at Novato High School.

In testifying about Robin Hettrich's problems with attendance, de Tuncq described his grading policy as it relates to attendance:

Q. Do you recall if Hettrich had a problem with attendance?

A. Yes, she had many absences and she had missed, I can't remember what percentage of the instruction now, but we, the faculty of Novato High School back in the early 70's in faculty meeting voted that it was a reasonable idea as far as the faculty was concerned that any student that missed more than 20 days of a one semester course,- and most one semester courses are about 90 hours, 90 days, that this was a reasonable basis on which to issue an F grade to a student. My own policy is that because calendars vary, I just say you have to attend 80 percent of the class session. There is something going on in class, a discussion, a film, something is going on and that when you miss the instructional program that it -

(Change of tape)

WITNESS: - than going on there and it's my policy to count every student's attendance and see which students have been absent the most and not give them the points for actually being there. And Robin objected to that, she said her absences were excused and I said yes, but you missed the course. And this was a dispute between Robin and myself.

Barry Conner testified that he was aware of de Tuncq's use of attendance in grading and drop policy, although he disagrees

that the 20-day rule is applied school-wide at NHS. de Tuncq's uncontroverted testimony indicates that, although Conner was aware of de Tuncq's practice, he never took any affirmative steps to change it. In fact, Conner testified that a teacher has the option of using attendance as a factor in grading and it is up to the individual teacher to make the decision on whether to do so. Moreover, other teachers at NHS used the same policy. Regarding both the drop policy and use of attendance in grading, de Tuncq testified as follows:

Q. Now, was Mr. Conner aware of your policy on dropping classes by students who wished to do so?

A. Yes, he was.

Q. How was he aware of that?

A. He evaluated me and following each observation, he writes up a document of what he observed that day and then he calls me in and we go over it and I have to sign it. And so every year, several times, he had an opportunity to talk to me about what I was doing in class, subject matter, what he actually observed that day, as well as grading policies, absence policies, and so on. I don't believe that there's an area that, where I have any regular practice that he hasn't, that he and I haven't gone over. And I've made it a point to bring this up to him because I think that I've recommended to him that he require all teachers to write their policies and put them on file with him so that he knows of them. . . .

Size of de Tuncq's Classes

One of the reasons offered by the District for de Tuncq's transfer was that students dropped his class in high numbers

and he therefore regularly carried a low class load. The size of de Tuncq's classes are apparently offered to show that students dropped out because of legitimate complaints about de Tuncq.

On this subject the District introduced into evidence an exhibit which included class size statistics in the form of a series of charts for each of the teachers in the social studies department during school years 1977-78 through 1979-80. Conner compiled these statistics and prepared this document in July 1980. The charts included the names of teachers, the number of students per period at the beginning of the semester, the number of students per period at the end of the semester, and the total number of students per teacher at the beginning and at the end of each semester. These statistics, as summarized by the District, show that de Tuncq routinely had a lower average class size than other teachers in the department.

For the following reasons the hearing officer finds that these statistics, taken separately or as summarized by the District, have little, if any, probative value with respect to the issue of whether students had valid complaints about de Tuncq. The statistics don't establish why students signed up for particular courses, nor do they show the reasons students may have had for dropping any given course. They do not show what courses were covered, nor do they show what courses were taught by any of the individual teachers. The statistics don't

show if the courses taught were required or elective. Though Conner testified that he used these statistics as a factor in deciding to transfer de Tuncq, on cross-examination he could answer none of the foregoing questions.

Furthermore, the record shows that many of the students reflected in these statistics as "drops" from de Tuncq's courses were near failing. Conner testified that one problem with de Tuncq was that there seemed to be confusion about his grading policy. Thus, it is reasonable to infer that some students who dropped de Tuncq's course did so due to dissatisfaction with their grade. These drops were automatically considered as strikes against de Tuncq with no investigation. Conner testified as follows;

Q. You think when a student is confused about grading policies that it's the student's fault or the teacher's fault?

A. It could be mutual.

Q. Could it be just the student's problem?

A. It might be.

Q. And you never went to Mr. de Tuncq to try to find out whether that confusion was partly of his making, did you?

A. No.

Other evidence supports the conclusion that these statistics are not reliable indicators of student complaints about de Tuncq. Conner conceded that some courses are more demanding than others, just as some teachers are more demanding

than others. Conner also conceded that no teachers taught the same courses as de Tuncq. It is established in the record that de Tuncq's courses, particularly personal philosophy and psychology, are more "advanced" or "challenging" courses. Of the seven students who dropped de Tuncq's courses during the second semester in 1980, four were in philosophy, two in psychology, and one (Hettrich due to truancies) in humanities. No students dropped de Tuncq's American Government class during this term. Further, as stated, each of these seven students dropped the course at a time they were receiving a D or F.

The Files Kept on de Tuncq

The District kept two personnel files on de Tuncq.¹⁹ One was kept in the District's personnel office and represents the official personnel file. Cary McCarthy, Novato Federation of

¹⁹The District's official policy (policy 4100) on personnel files reads in relevant part as follows:

- C. Anonymous material shall not be placed in personnel files.
- D. Information or statements of a derogatory nature, except material obtained for the purposes of hiring, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon within three (3) days. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comments thereon. Such review shall take place during normal school hours, and the employee shall be released from duty for this purpose without loss of pay.

Teachers president, reviewed de Tuncq's official personnel folder in June 1980, and again in July 1980. There were no parent complaints in this file covering the last three years, and she found no otherwise derogatory information.

The second file, 112 pages in length, was personally kept by Conner in his office. de Tuncq was never informed of the existence of this file. Some of the information in Conner's file can clearly be characterized as "derogatory."

The file Conner kept on de Tuncq contained a variety of documents as described below. None of these were placed in de Tuncq's official file. There were numerous Novato Federation of Teachers newsletters, some where de Tuncq was personally named. There were also documents relating to the various issues de Tuncq had handled as an NFT representative, e.g., class size, basic language skills, absence and tardy reports, etc. These dated as far back as October 1978. In addition, a June 6, 1980 memo to the file by Conner was included. This memo detailed the events at the first level grievance meeting dealing with de Tuncq's transfer and corroborates de Tuncq's testimony as to what happened at the meeting.

The file also contained much documentation relating to the incidents Conner characterized as complaints about de Tuncq. The Tracy Morrill case was well documented, as were both Diana Ziss incidents and the John Cheney matter. There was a June 10,

1980 letter critical of de Tuncq from Mr. and Mrs. Richard Dykes, the parents of one of de Tuncq's students. The May 12, 1980 memo from Conner to Superintendent Franklin listing "incidents" involving Briggs, Wilhelm, Kirkwood, Hagan, Silva, Barsch and Bradley was included. Numerous other references to the Briggs complaint were contained in the file, including Mr. Briggs¹ April 17, 1980 letter to Superintendent Franklin. Evidence documenting the Hettrich and Hagan drops was included, as was Slevin's written comment critical of de Tuncq. Mrs. Wilhelm's April 10, 1980 letter to de Tuncq was also in the file.

The class size statistics referred to earlier were in the file along with supporting documentation in the form of class lists. The file also contained many documents²⁰ about seven students not otherwise mentioned above who either dropped or withdrew from de Tuncq's class during the first quarter of the 1979-80 school year.²¹

²⁰These documents consist of "Course/Program Change Petitions," which contain, among other things, the student's reason for dropping the course and the parent's consent. These may be referred to as drop slips.

²¹At some point during the spring semester of the 1979-80 school year Conner asked all guidance counsellors to provide him with the names of all students who dropped de Tuncq's class. Thus, these "drops" found their way into de Tuncq's file. He did not ask for similar information about other teachers and therefore had no basis to compare the number of drops.

Three of these drops occurred during the first two weeks of the 1979-80 school year. Conner testified that drops early in the year are most common because a student may decide he or she doesn't want the class anymore or there may be a "personality conflict" with the teacher. Under the practice at NHS, a student need not provide a reason for dropping a course during this part of the quarter. Four other students dropped de Tuncq's course after the first two weeks of the 1979-80 school year. Each of these students was doing poorly in the course.

At no time did Conner attempt to discuss any of these students' reasons for dropping with de Tuncq, nor was any evidence presented to indicate that Conner or any other District official attempted to investigate the reasons for these drops or otherwise ascertain from those students the specific reasons for their dropping de Tuncq's class.

The Collective Bargaining Agreement

Article V of the collective bargaining agreement covers transfers.²² NFT negotiators testified that only two reasons

²²Article V states in relevant part:

Involuntary Transfers.

- a. Employees shall be advised of a proposed involuntary transfer. Where possible, the official notice of an involuntary

for permitting an involuntary transfer were "discussed" at the table: reduction in the number of students and a change in program. According to the NFT witnesses, other reasons were "mentioned," but the focus was on only these two reasons. Based on these discussions and the contract language, NFT argues that an involuntary transfer can be made only if there is a reduction in the number of students or a change in program.

District witnesses who were present at the negotiations testified that there were many reasons discussed in regard to the circumstances under which an employee could involuntarily be transferred, but the discussions never narrowed to the point where reasons for involuntary transfer were only those included in Article V.A.4 of the agreement. According to these

transfer shall be given to the employee by June 1.

- b. The employee in an involuntary transfer may request a meeting with the Superintendent or designee.
- c. When a new program is created in the District, no one shall be involuntarily transferred to such programs if there are volunteers who meet the applicable qualifications.
- d. In the event a staff reduction is necessary at a school site or due to a program change in special services, the employee so affected shall be given first consideration in line with the criteria mentioned above.
- e. All employees involuntarily transferred shall have the right to apply for vacancies.

witnesses, the District retains the right to involuntarily transfer an employee for a variety of educationally related reasons.

Refusal to Provide Information

At the May 30 meeting attended by de Tuncq, McCarthy, Mobley and Franklin, de Tuncq asked for a list of names of the teachers who would be transferred in the 1980-81 school year. As stated, it is the Federation's position that teachers may be involuntarily transferred under the contract only if there is a reduction in staff or a program change for special services. The list was requested in order to enable the Federation to monitor the agreement and determine if the transfers were in accordance with the terms of the contract.

The Federation was not given the list at that time. Mobley testified that the information sought by the Federation was not then available and he would provide it as soon as possible. At a meeting on June 5 attended by de Tuncq, Kim Roether, a grievance committee member, and Mobley, the list was produced and given to the Federation. Mobley met shortly thereafter with NFT representatives to discuss the reasons for the transfer of those employees on the list.

DISCUSSION AND CONCLUSIONS OF LAW

The Reasons for de Tuncq's Transfer

Charging party argues that de Tuncq's transfer was in retaliation for his protected activity, and the reasons offered

by the District for the transfer are pretextual in nature. The District, on the other hand, asserts that de Tuncq's protected activities had nothing to do with the transfer. The District's brief asserts that "Mr. de Tuncq was transferred because of an excessive number of parent and student complaints regarding his grading and his manner of relating to students." An apparent extension of this reason is the District's conclusion that these complaints manifested themselves in a consistently low average class size as a result of students dropping de Tuncq's courses. An additional reason offered by Conner at the May 12 meeting and at the hearing was his opinion that de Tuncq "needed a change."²³

It is recognized that, in comparison with other teachers, more "incidents" involving de Tuncq were brought to Conner's attention. Likewise, it is recognized that de Tuncq's average class size was usually the lowest in the social studies department. However, these factors, standing alone, do not necessarily prove that de Tuncq's conduct was improper or unprofessional. It stands to reason that if the complaints were unfounded, or if students dropped classes for reasons unrelated to his performance, the District's reasons for the

²³The District's brief does not directly argue this was a reason for the transfer. Since Conner testified he thought de Tuncq needed a change, and told him so on May 12, this reason will be addressed in this decision.

transfer may be pretextual, thus creating the possibility of an unlawful motive. The same is true regarding the question of whether de Tuncq had become stale. If the evidence shows that he had not, this reason too may be found to be unmeritorious, again giving rise to the possible inference of unlawful motive. Therefore, all of the complaints and reasons, as well as the manner in which the District carried out the transfer, must be carefully scrutinized. After doing so, relevant PERB decisions will be applied.

The record clearly shows that de Tuncq was far from stale. Throughout his long tenure at Novato High School he consistently demonstrated a high quality of work. He was instrumental in reorganizing existing courses and he instituted new courses in the social studies department. He sometimes taught more than the required number of preparations. His long service as chairperson of the department underscores the high regard in which he was held by his colleagues and his principal. Additionally, the social studies department prospered under de Tuncq's chairmanship, as reflected by the evaluation and accreditation team's praise of the department.

de Tuncq's high level of performance is also reflected in Conner's written evaluations, the last one having been received on March 24, 1980, only weeks before the transfer was announced. These evaluations are without the slightest hint that de Tuncq was anything but a model teacher. They show that Conner always

gave him the highest rating in all categories, and he almost always included complimentary written comments about de Tuncq's teaching. These written evaluations speak for themselves and need not be detailed here. (See Findings of Fact, pp.42-45.) However, one point is noteworthy as it relates to the question of de Tuncq's staleness. Barry Conner testified that, in his view, one indicator that de Tuncq needed a change was his desire to teach only more advanced students and his impatience with slower learners. Presumably this would adversely manifest itself in de Tuncq's teaching. However, Conner's written evaluation of de Tuncq for the 1979-80 school year indicates that:

The wide variety of teaching methods and evaluation of students gives students of all intellectual abilities an opportunity to pass Mr. de Tuncq's classes.

Conner also wrote in the March 24 evaluation that:

de Tuncq has effectively reached at least 85% of his students.

The glaring inconsistency between Conner's testimony and this recent evaluation serves to undermine his credibility on this point and casts serious doubt on "staleness" as a valid reason for the transfer.

Furthermore, the hearing officer finds it inherently improbable that de Tuncq grew stale between March 24, 1980, the date of his last written evaluation, and early May, when Conner first informed de Tuncq that he needed a change. The District

offered no evidence relating to this period which would tend to explain this inherent improbability. To the contrary, Conner could have issued de Tuncq another evaluation covering this time frame to record any post-March 24 dissatisfaction with his work. He failed to do so.

Based on the foregoing, the hearing officer concludes that the District's first reason for transferring de Tuncq is totally groundless. de Tuncq was not stale and consequently not in need of a change. To the contrary, his evaluations show that he was a teacher who built an excellent work record at NHS while Conner was principal. This excellent work record may be considered as a factor in weighing the validity of the District's reasons for the transfer. The Huntington Hospital (1977) 229 NLRB 253 [95 LRRM 1062];²⁴ Marin Community College District (11/19/80) PERB Decision No. 145, p. 17.

Another reason offered for the transfer was the high number of parent and student complaints about de Tuncq. In support thereof, Conner first testified as to three incidents which occurred prior to his March 24, 1980 written evaluation of

²⁴comparable provisions of the federal Labor-Management Relations Act (LMRA), 29 U.S.C. 151, et seq., may be used to guide interpretation of EERA. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.) Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

de Tuncq. He mentioned Ziss, Cheney, and Morrill as examples of incidents which figured in the transfer decision.²⁵

The hearing officer finds unpersuasive the argument that these pre-March 24 complaints form a valid basis for the transfer. Conner evaluated de Tuncq for four consecutive school years in "relations with students and parents," the same areas where the so-called complaints are said to have occurred. In each area de Tuncq consistently received the highest possible rating. Although Conner was obviously aware of these pre-March 24 so-called complaints, and even discussed them with de Tuncq, he never considered them significant enough to record in de Tuncq's written evaluations. To the contrary, in each area de Tuncq received the highest rating possible.²⁶ The only reasonable conclusion one can draw from this evidence is that these incidents were, at that time, considered by Conner to be insignificant. They were revived at a later date to be used as ammunition to transfer de Tuncq.

²⁵According to Conner, these complaints formed only a background for his decision to transfer de Tuncq. It was actually the large number of complaints received after March 24 which prompted the decision. Nevertheless, the pre-March 24 complaints will be discussed because they shed light on the pretextual nature of the District's reasons for the transfer.

²⁶For example, the Ziss and Morrill incidents occurred during a period when Conner evaluated de Tuncq as "effective" in dealing with students and parents. The Cheney incident similarly occurred during a period when Conner rated de Tuncq "effective" in cooperation with staff. There was no evidence that Cheney or his parents complained about de Tuncq.

This raises the question of whether the nature or number of the so-called complaints received after March 24, 1980 constitute valid reasons for de Tuncq's transfer or, on the other hand, are they simply a pretext for retaliating against him for his protected activity. Before examining the specifics of these complaints, however, it is helpful to cast them against the background evidence.

Initially, it is significant that the post-March 24 complaints were diminished since they were substantially similar to those made before March 24. Thus, Conner's standards for similarly situated complaints were changed without explanation.

The majority of the post-March 24 complaints stemmed not only from allegedly poor relationships with parents or students but also from disagreements over certain aspects of de Tuncq's teaching. These complaints may be broken down into three general areas.

Some centered on disagreement with de Tuncq's grading criteria, especially with reference to his use of punctuality and attendance as factors in grading. These complaints eventually manifested themselves in parent and student dissatisfaction with actual letter grades. However, the evidence shows that a teacher has the option of using attendance as a factor in grading. Barry Conner was aware of the grading procedures used by de Tuncq and never objected or counseled de Tuncq to change them in any way. Conner testified

at length during the hearing and never directly condemned de Tuncq's grading policies. Indeed, de Tuncq's most recent evaluation reveals that Conner was satisfied with the way de Tuncq evaluated students. The District cannot now argue that a parent or student complaint, which has at its core approved grading criteria, constitutes a valid basis upon which a teacher is transferred. If such a complaint is valid, Conner is as much to blame as de Tuncq. 'Taking adverse action against an employee for conduct which has been accepted in the past may be viewed as evidence of an unlawful motive. V & V Castings (1977) 231 NLRB 912 [96 LRRM 1121]. enf. (CA 9 1978) 587 F.2d 1005 [100 LRRM 2303].

In addition, Conner testified that disputes over grading policy may be the fault of the student or the teacher, or it could be just the student's problem. Each complaint involved a student who was either failing or close to it. Yet he failed to fully investigate the majority of these claims or discuss them with de Tuncq to determine their validity. He accepted them at face value, even though he usually discussed student/parent complaints with teachers if they were "at all serious."²⁷ A

²⁷conner had some discussion with de Tuncq about the grade-oriented complaints of only Briggs and Wilhelm, but the record does not show that there was any discussion about the other complaints. Bradley did not contest her third quarter grade, and Mrs. Bradley protested her fourth quarter grade in September, approximately five months after Conner had decided to transfer de Tuncq. Conner never discussed Slevin's

complaint about a grade, according to Conner, is usually disposed of by asking the teacher to explain how he arrived at the grade. The fact that Conner did not do so indicates that he was less concerned about the substance of these complaints and their ultimate resolution than he was about using them as a basis to transfer de Tuncq. As such, his conduct may be viewed as evidence of an unlawful motive. FAR-MAR Co., (1977) 231 NLRB 814 [96 LRRM 1133].

Other parent and student complaints focused on de Tuncq's alleged failure or refusal to provide adequate instructions or explanations about course requirements. The evidence shows, however, that de Tuncq provided detailed written guidelines in this area at the outset of each term. And Conner, in de Tuncq's March 24 evaluation, praised the "clarity with which [de Tuncq] gives assignments." Once again, the glaring inconsistency between the March 24 evaluation and Conner's present assertion

dissatisfaction regarding her grade with de Tuncq. The matter was first brought to de Tuncq's attention at the hearing. Hagan's grade-related complaint was not fully explored by Conner. He wrote in a memo of May 12 to Mobley that de Tuncq and Hagan had a "clash of personalities," but indicated that they had made some arrangements about Hagan's work for the remainder of the year. Conner did not become aware of the Hettrich matter until approximately May 22, after he had made the transfer decision. In any event, Conner never raised the matter with de Tuncq to permit him to explain that Hettrich's grade was as a result of absences due to illness. In sum, only two of the six post-March 24 grade-related complaints were mentioned to de Tuncq, thus indicating that, according to Conner's own testimony, the others were not "serious."

that de Tuncq's assignments were unclear casts serious doubt on the legitimacy of this complaint.

The last general category of complaints involved comments made by de Tuncq to students and/or parents. As more fully explained below, the evidence does not show that de Tuncq's comments were offensive or otherwise improper. They were generally exaggerated by Conner without investigation or discussion with de Tuncq and then used as a basis for the transfer.

It is against this background that merits of the parent/student so-called complaints must be examined.

Mr. Briggs was dissatisfied with his son's letter grade and protested the grading criteria used by de Tuncq especially the use of attendance and punctuality as factors in grading. de Tuncq explained that Briggs lost points due to his tardies as a result of swimming practice. As stated, this was an accepted grading practice at NHS.

Mr. Briggs did not expressly complain about de Tuncq's relationship with parents. And evidence relating to de Tuncq's meeting with Mr. Briggs reveals that comments outlining Briggs¹ alternatives as to Mark's grade cannot reasonably be construed as offensive or unprofessional. While de Tuncq apparently offered to change Mark's grade, he later consulted with Conner and ultimately told Briggs that the grade could not be changed. While this incident may reflect poor judgment by de Tuncq, it

does not translate into the broader conclusion that de Tuncq had poor relationships with parents. More accurately, it represents only a disagreement about a grade.

The gist of Rebecca Lee Bradley's testimony is that she was dissatisfied with her failing grade in humanities at the end of the third quarter. Though she complained about her grade, she admitted not fulfilling course requirements. Also, de Tuncq was not impressed with her selection of the "baby harp seals" topic, nor was he impressed with the quality of her work on the project. Thus, in view of this student's admission that she did not fulfill course requirements and de Tuncq's convincing testimony regarding the low quality of her baby harp seals project, it is concluded that Bradley's low grade cannot be interpreted as reflecting poorly on de Tuncq. Further, although Bradley described de Tuncq's assignment as "confusing," the record evidence, including Conner's evaluation of de Tuncq, shows that assignments were given with "clarity."

In addition, the record does not show that de Tuncq's communication with Rebecca Bradley's mother was in any way improper or unprofessional. Mrs. Bradley contacted de Tuncq about Rebecca's grade. Showing a willingness to meet with this parent, de Tuncq spoke with Mrs. Bradley on the telephone twice, and he met with her in person once. There was no indication that Mrs. Bradley had any complaints about de Tuncq based on the way he conducted himself during these discussions. Furthermore,

Mrs. Bradley didn't file her complaint about Rebecca's final grade, which was given at the end of the 1979-80 school year, until the following September, long after Barry Conner had made his decision to transfer de Tuncq. The evidence simply does not show that de Tuncq dealt with Mrs. Bradley in an improper way.

Rebecca Bradley's testimony, likewise, does not show that de Tuncq's classroom relationship with students was lacking.²⁸ To the contrary, she testified only that de Tuncq "made little comments" but "nothing really serious." Indeed, she described de Tuncq's comments as mere disagreement with student answers:

...purposely doing that so that people in the class would look a little harder at the situation, you know, answer better questions.

This testimony does not indicate that de Tuncq had poor relations with students. Rather, it indicates that he attempted to get maximum participation out of students during classroom discussions.

While de Tuncq's comment about girls having power over boys may have offended Bradley, it does not rise to the level of a serious complaint. de Tuncq was simply trying to break up a group of students before starting class. This is well within

²⁸Great weight is given to Rebecca Bradley's testimony about de Tuncq's classroom relationship with students. Although many students testified at the hearing, Bradley was the only one who testified at any length on this point, even offering specific examples of what the District considers to be improper comments by de Tuncq.

his prerogative as a teacher. The District's position that it actually believed this comment to be improper is inherently unbelievable and therefore not persuasive.

Linda Wilhelm received an F in personal philosophy because of her high number of tardies and her failure to submit the written evidential file. She said she didn't understand the requirements of the course or what was required in the form of the evidential file. But written course requirements in philosophy, like humanities, were distributed along with the explanation of the evidential file. In order to clarify these points, de Tuncq counseled Linda that she would have to begin meeting course requirements. This was not enough and prompted a letter from Mrs. Wilhelm.

Mrs. Wilhelm asked de Tuncq what Linda needed to do to improve in the course. She also asked for written progress reports on a weekly basis. de Tuncq promptly responded in writing that Linda was not meeting course requirements and informed Mrs. Wilhelm what those requirements were. He met with Mrs. Wilhelm and told her that he could not provide the weekly reports she requested because, as is clear from the record, the personal philosophy course did not lend itself to that kind of reporting.

Another complaint from Mrs. Wilhelm involved her allegations that de Tuncq degraded Linda and made her grovel during the course of an earlier meeting about her progress in the course.

However, neither de Tuncq nor Linda corroborated Mrs. Wilhelm's version of this meeting. A fair reading of their combined testimony shows that de Tuncq told Linda only that he had seen no improvement in her work. Since Mrs. Wilhelm was not at the meeting, her characterization of de Tuncq's comments during that meeting, when compared with the testimony of Linda and de Tuncq, are unpersuasive on the point of whether de Tuncq acted improperly.

Mrs. Wilhelm was also angered by de Tuncq's statement that Linda could pass the course. She claimed this statement was inconsistent with de Tuncq's earlier comment to Linda on the subject. But the record shows only that de Tuncq told Linda he saw no improvement. These two comments are not necessarily inconsistent. While Linda may not have improved as of her conversation with de Tuncq, it is entirely possible that she could have eventually passed the course on the strength of her work later in the term.

Mrs. Wilhelm eventually met with Conner to discuss this matter. After the meeting Linda dropped the course and received no mark. Conner subsequently met with de Tuncq and told him Mrs. Wilhelm felt his answers had been short and therefore rude. de Tuncq, however, described the meeting with Wilhelm as "quite short and very innocuous." de Tuncq's testimony about his meeting with Mrs. Wilhelm is credited. He was present at the meeting and Conner was not. Mrs. Wilhelm

testified at the hearing but did not expressly describe de Tuncq as rude during the meeting.²⁹ Thus, while the meeting may have been short, there is no valid basis to conclude that de Tuncq was rude to Mrs. Wilhelm in discussing Linda's standing in class.

Maureen Slevin's complaints likewise stemmed from dissatisfaction with her grade and with the way she claims de Tuncq assigned points for oral participation in class. These complaints, like the others, are groundless. With regard to her grade, it is undisputed that she received only 65 out of 100 in oral participation and she received no points for attendance. Slevin did not hand in an evidential file, and, according to de Tuncq who observed her throughout, she had no interest in the class. While Slevin may have been unhappy with her grade, this can hardly be characterized as a complaint which legitimately supports de Tuncq's transfer.

Furthermore, with respect to the second aspect of Slevin's complaint, de Tuncq's explanation of his procedure for assigning points based on oral participation in class indicates that Slevin's description of this process is inaccurate. de Tuncq convincingly testified that his assignment of points for

²⁹Her chief complaints concerned de Tuncq's behavior at an earlier meeting with Linda and what she believed to be inconsistent statements by de Tuncq about Linda's future in the course. She did not testify that de Tuncq's short answers were rude.

oral participation is not based on random assessments, as Slevin charges, but rather on approximately 45 hours of classroom observation. Each student is observed and the quality of the student's comments taken into consideration. Points for oral participation clearly are not assigned in an arbitrary manner.

Slevin's case is significant for the way it was handled by Ross and Conner. Slevin was a student who sought to drop a course because of dissatisfaction with her grade and the way points for oral participation were assigned. She went to Ross who, in turn, reported to Conner. Slevin dropped the course. After Ross took her on as an assistant, he asked her to record her complaints in writing, which she did. This document was transmitted to Conner who placed it in a secret file and eventually used it as a partial basis for the transfer. Not once during this entire process did Ross or Conner suggest to de Tuncq that this was occurring, nor did either of them attempt to discuss the complaint raised by Slevin. The first time de Tuncq even saw Slevin or heard of her complaints after she dropped his class was at the hearing. If either Ross or Conner were genuinely interested in addressing complaints of the type raised by Slevin, they would have taken steps to, at minimum, hear de Tuncq's side of the issue. The fact that they did not casts serious doubt on the District's assertion that de Tuncq's transfer was in part due to student complaints.

FAR-MAR Co., supra; Tama Meat Packing Corp., (1977) 230 NLRB

116 [96 LRRM 1148], mod. (CA 8 1978) 575 F.2d 661 [98 LRRM 2339].

Like the others, Deborah Hagan was dissatisfied with her letter grade as well as with de Tuncq's response when she asked about the grade. Although she testified that de Tuncq once walked away from her when she asked about the grade, she also testified that the next day de Tuncq showed her grade-related charts and explained that she wasn't fulfilling course requirements. This did not satisfy Hagan who said she was aware of the requirements and thought she had satisfied them.

Thus, this part of Hagan's complaint boils down to a disagreement between a student and a teacher about a grade and Hagan's apparent impression that de Tuncq did not show her enough attention when explaining the grade. While Hagan may have understandably formed the impression that she should have been given more of an explanation, it is recognized that a teacher who has well in excess of one hundred students may not be able, during the course of a school year, to afford all students all the time requested at the precise time the student chooses. The pressure of teaching and/or other commitments within the school community may reasonably prevent this. What is important here is that de Tuncq discussed Hagan's grade with her the following day, and he met with Mrs. Hagan later for the same purpose. With respect to Hagan, de Tuncq clearly did not shirk his responsibilities as a teacher.

While Hagan's conflict with de Tuncq was based in part on her letter grade, her chief complaint grew out of meetings with de Tuncq and Mrs. Hagan. Based on the record evidence, it is concluded that the incident regarding de Tuncq's alleged refusal to meet with Mrs. Hagan amounts to nothing more than a misunderstanding between de Tuncq and Deborah Hagan as to the time of the meeting. de Tuncq could not meet with Mrs. Hagan because he had a meeting already scheduled with another parent. But he met with them the next day, and, according to Barry Conner's memo to Superintendent Franklin regarding that meeting, "received them politely." de Tuncq even offered to let Deborah submit a written paper to satisfy course requirements.

Hagan next complained about de Tuncq's comment that she was not college material. This offended her. But the hearing officer credit de Tuncq's version that he simply told Mrs. Hagan that, in his view, Deborah was not mature enough to do work at the highest University level and he recommended she enter a good junior college before trying a school like the University of California at Berkeley. This comment does not strike the hearing officer as being offensive or unprofessional in any way. When asked, de Tuncq simply gave his professional opinion about Deborah's future in college. A teacher's professional judgment about a student's academic ability cannot reasonably be construed as offensive or otherwise improper.

Robin Hettrich's so-called complaint was also based on a

low grade. Her grade was due primarily to many absences as a result of an illness during the third quarter. de Tuncq issued a progress report saying she would not pass the course if she did the same amount of work during the fourth quarter as she did during the third quarter. This obviously discouraged Hettrich, for she began to incur many more absences. After nine truancies her counselor suggested that she discuss the situation with de Tuncq. She did, but they couldn't work things out. Hettrich dropped the course on May 23.³⁰ In view of these circumstances Hettrich's decision to drop the course cannot reasonably be construed as a mark against de Tuncq. She simply did not attend enough classes to pass the course.

The May 12 Memo

In his memorandum of May 12 to Superintendent Franklin Barry Conner cited other "incidents" regarding de Tuncq's relationship with students. The examples offered by Conner are similar in nature to those already discussed, but, like the others, these incidents do not rise to the level of "complaints." For example, Barry Conner told Superintendent Franklin that Susan Kirkwood, a student who was apparently doing poorly, complained

³⁰The entire Hettrich matter did not come to Conner's attention until May 22, after he told de Tuncq he was relieving him of the department chairmanship and "giving strong consideration to giving him an involuntary transfer." Thus, it is questionable whether this so-called complaint was a part of Conner's ultimate decision to transfer.

about the structure of de Tuncq's course and the lack of information about course requirements. de Tuncq's un rebutted testimony established that Kirkwood had turned in no written work, had low attendance, and only average oral participation. Moreover, the record indicates that de Tuncq informed each of his classes about course requirements in writing at the outset of the term. If Kirkwood did not understand these requirements she could have brought this to de Tuncq's attention and attempted to work the matter out, or Conner could have initiated such a discussion. In the absence of any such attempts her so-called complaint can't be taken seriously. Also, even if de Tuncq told Mrs. Kirkwood that his class was for "brighter students" this cannot be construed as improper for the evidence shows that his classes were, in fact, more "advanced" or "challenging."

Conner's reference in the memo to Catherine Barsch can best be described as a non-complaint. In essence, Conner told Franklin that Barsch was "near failing" and de Tuncq had estimated in her progress report that she would not do enough work to earn credit in the course. These facts standing alone simply do not constitute a so-called "incident." The Barsch matter represents nothing more than a teacher's assessment of a student.

The memo further states that another student, Sharon Silva, dropped the class essentially because de Tuncq ignored her when

she tried to speak. This comment, too, without more, does not amount to a valid complaint.³¹ It may well be that de Tuncq showed Silva less attention during his class than he showed other students, and this formed the basis for her complaint. However, a teacher can hardly be expected to give each student an equal amount of attention. Since there was no evidence presented to show that de Tuncq went beyond this and, in fact, "ignored" Silva, this complaint cannot be taken seriously.

The Barsch and Silva matters simply represent two students dropping courses at a time they were doing poorly. Under de Tuncq's drop policy, which Conner was aware of and at least tacitly endorsed, this is not unusual. Moreover, other than the Conner memo, there is no evidence that these students or their parents complained about de Tuncq. Once again, if Conner was interested in resolving these matters he surely would have initiated the most minimal discussion with de Tuncq. He never discussed Barsch, Silva or Kirkwood with de Tuncq.

Low Class Size

The last reason offered by the District was de Tuncq's consistently low class size. This reason, like the others, is

³¹This allegation must be viewed with suspicion when considered in light of Conner's classroom observations of de Tuncq which were attached to the March 24 evaluation. Conner wrote that the classroom discussion was conducted in an "open atmosphere," and that "measurable learning could be seen by class interaction with the instructor and with the students."

found to be without merit. Low class size does not automatically establish a shortcoming on the part of the teacher, just as consistently high class size would not necessarily mean that a teacher is excellent. While low class size may be an indicator that a teacher does not relate well to students or parents, thus generating an excess of drops or complaints, there must be some other objective evidence to support this claim. In this case the District has provided no such evidence.

The District's statistics purporting to show that de Tuncq consistently had low class size are not probative evidence on the question of de Tuncq's relationship with students and parents or of his performance as a teacher.³² de Tuncq taught courses that he described as "advanced" and Ralph Del Sarto a guidance counsellor, described as "challenging." No other teacher taught these courses. And, as already determined examples of complaints offered by the District have been found, in large part, to be totally without merit, thus precluding them from being used to support these statistics.

In addition, some student drops apparently relied on by Conner in reaching the decision to transfer do not constitute persuasive evidence that students dropped de Tuncq's course in

³²see Findings of Fact, pp.42-45.

large numbers because of any shortcoming on his part. For example, Conner's secret file on de Tuncq shows that seven students dropped de Tuncq's course in the early part of the 1979-80 school year. However, on closer examination, it is revealed that at least three of these dropped the course during the first two weeks of the quarter. Under established practice at NHS, students may do so without offering a reason for the drop. This permits students to change schedules if after a few classes they decide on another course and cannot reasonably be viewed as reflecting poorly on de Tuncq.

It is significant that Conner made no investigation of the remaining drops and the District offered no credible evidence to show that they were based on valid complaints against de Tuncq as opposed to student dissatisfaction with the fact that they were doing poorly in the course.³³

Lastly, assuming the District's class size statistics are accurate, de Tuncq's average class size had been low ever since Conner became principal. Despite this, Conner never raised

³³The drop slips submitted by two of these students indicated that they dropped the course because of de Tuncq's classroom comments. None of these students testified, and there is no evidence that Conner investigated these comments for accuracy. Indeed, there seems to have been no close scrutiny of these comments by any District official. In view of Rebecca Bradley's description of what the District considered to be offensive comments made by de Tuncq in class, the failure on the part of the District to more closely examine the content of drop slips makes it impossible to give this evidence any weight.

this matter with de Tuncq, nor did he ever attempt to relate class size to de Tuncq in any adverse way. Therefore, statistics showing low class size, standing alone, carry little weight as to the questions of whether de Tuncq related poorly to parents or students or that he needed a change.

Application of the Carlsbad Test.

The Board established a single test for resolving alleged violations of section 3543.5 (a) dealing with employer conduct. Carlsbad Unified School District (1/30/79) PERB Decision No. 89. This test may be summarized as follows. Where there is a nexus between the employer's acts and the exercise of employee rights a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct the competing interests of the parties are balanced and the issue resolved accordingly. If the employer's acts are inherently destructive of employee rights however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record. Santa Monica Community College District (9/21/79) PERB Decision No. 103 at p. 17. The application of this test will determine the outcome of the instant charge.

de Tuncq had a long history of union activism at Novato High School. He served as the Federation's president, negotiator, grievance officer, grievance committeeman, and building representative. These activities brought him into direct conflict with Principal Conner on significant issues at Novato High School, i.e. class size grievance, disputes over teaching basic language skills, and entering of absences and tardies on report cards. In several of these matters the controversy boiled down to a confrontation between Conner and de Tuncq. Frequently the dispute was aired in full view of unit employees as in those instances where de Tuncq circulated memos to employees exhorting them not to follow a particular Conner directive, e.g. de Tuncq's memo to employees regarding the absence and tardy issue. In addition, de Tuncq openly defied Conner by refusing to enter the absence and tardy information on his report cards, and Conner responded by lowering de Tuncq's evaluation in recordkeeping for failing to follow his instructions. It is undisputed that de Tuncq was a union activist and the District was aware of his activities.

Conner's animosity toward de Tuncq clearly showed in grievance procedure, the main vehicle de Tuncq had for challenging the action. Despite the seriousness of the grievance, Conner never fully explained the reasons for the transfer, either in these meetings or in the May 28 letter

officially announcing the transfer.³⁴ Upon being questioned by de Tuncq on this point Conner would only reply that the transfer was for the good of the school. As the record shows, there were other more specific reasons. Conner's explanation during the grievance procedure that de Tuncq was being transferred "for the best interest of the school," with no determination as to where he would be transferred is akin to no explanation at all. The NLRB has looked upon such conduct as evidence of a discriminatory motive. Taft Broadcasting Co. (1978) 238 NLRB 588 [99 LRRM 1403].

When Conner eventually articulated the reasons underlying the transfer decision, they emerged as vague and shifting. The post-March 24 complaints (disagreement about actual letter grades, confusion over class assignments and alleged improper or offensive comments) were reasons given for the transfer. There were, however, other reasons given at different times. For example, in May 1980 Conner said de Tuncq was being transferred because he needed a change, was rude and abrupt with parents, thus generating a lot of complaints, and was likewise rude and abrupt with faculty members. The latter

³⁴The only time Conner made any attempt to tell de Tuncq why he was being transferred was during the May 12 discussion. However, even then he said only that he was relieving de Tuncq of the department chairperson duties and thinking of transferring him because of parent complaints. Some reasons for the transfer were mentioned, but none were fully discussed.

reason was never again mentioned as a reason for the transfer. When called to testify at the hearing, Conner reiterated the reasons given in May, except for being rude and abrupt with faculty. He also added that de Tuncq had a lower average class size than other teachers in the department, had no patience with slower students, and confused students by not clearly making work assignments. Upon being recalled to the stand, Conner added yet another reason that de Tuncq's grading policy and confusion as to how he arrived at a grade were reasons for the transfer. Each of these reasons is addressed in this decision. However, it should be noted that the shifting and vague reasons offered by Conner are themselves indicative of an unlawful motive. See The Roberts Press (1971) 188 NLRB 454.- [76 LRRM 1337]; Stoll Industries, Inc. (1976) 223 NLRB 51 [92 LRRM 1188].

In addition, the evidence showed that there has never been another transfer of a department chairperson. Despite de Tuncq's position and experience, Conner never seriously attempted to counsel him on his alleged shortcomings. After years of receiving near perfect evaluations from Conner, de Tuncq was transferred after Conner received a handful of groundless complaints.

Further, the abrupt transfer was to a position which seems entirely inappropriate for a teacher of de Tuncq's experience and record. de Tuncq, a 23-year social studies teacher at the

secondary level, was initially transferred to a permanent substitute position in a junior high school. As of the approximate time of hearing., the District was still searching to find or create some other position for de Tuncq. Eventually, he was again transferred to San Jose Junior High School where he was permanently assigned to teach United States history and law, the latter a subject about which he admittedly knew little. In order to fit de Tuncq into this assignment, the District, after the school term had started, rearranged the teaching assignments of several other teachers in that school. This appears to be disruptive of the educational process rather than beneficial to it, and creates a serious question as to the legitimacy of the transfer. See Carlsbad Unified School District (1/30/79) PERB Decision No. 89, at p. 12, where a transfer under like conditions was similarly viewed as unlawful by the Board.

Further, the transfer was illegally based, at least in part, on information secretly maintained by Conner in a confidential file. de Tuncq was not aware of the file itself, nor was he aware of much of the information contained therein and used by Conner as a basis for the transfer. For example, de Tuncq was not made aware of Slevin's written version of her experience in his class solicited by Vice Principal Ross. The same is true of the letter from the Dykes family which was critical of de Tuncq. de Tuncq had never seen Conner's May 12 memo to Franklin; though he was aware of some of the information in

that memo (i.e., that relating to the Briggs and Wilhelm incidents), he was not aware of other information included therein (i.e., that relating to Barsch and Silva). Moreover, while de Tuncq may have been aware of the occurrence of certain events which were reflected in the file, he was certainly not aware that information about these events was being stored to use against him as a reason for his transfer, e.g. student drop slips, class lists, class size statistics. By maintaining derogatory information in this file and using it as part of the reason for the transfer without first giving de Tuncq the opportunity to review or respond to it, Conner appears to have violated the District's internal policy covering personnel files, as well as section 44031 of the Education Code.³⁵ The California Supreme Court has recently interpreted this section to mean that:

Unless the school district notifies the employee of such derogatory material within a reasonable time of ascertaining the material, so that the employee may gather pertinent information in his defense, the district may not fairly rely on the material in reaching any decision affecting the employee's employment status. Miller v. Chico Unified School District (1979) 24 Cal. 3d 703, 713, 157 Cal.Rptr. 72.

³⁵Education Code, section 44031, states in relevant part:

Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made

It is clear that this rule has been violated in the present case.

The information kept in Conner's file indicates a desire to build a case against de Tuncq as a pretext to transfer him. If Conner was genuinely concerned about parent/student complaints or student drops, he would have told de Tuncq of the information he was keeping in the file and discussed the substance of these matters with him. In any normal employer-employee relationship this would have occurred. Inasmuch as Conner did not tell de Tuncq of most of the information in the file, or of the possibility that the information would be used against him, it is concluded that Conner was not nearly as concerned with the

available for the inspection of the person involved.

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Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employment district.

Information of a derogatory nature, except material mentioned in the second paragraph of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement his own comments thereon. Such review shall take place during normal business hours and the employee shall be released from duty for this purpose without salary reduction.

substance of the information or the resolution of the so-called complaints as he was with building a paper record against de Tuncq. Since de Tuncq had recently received a good evaluation and Conner had clearly overstated the complaints against him, it is further concluded that the decision to keep the file on de Tuncq and the secret manner by which this was done, is evidence of an unlawful motive. FAR-MAR Co. supra, p. 817.

The fact that Conner investigated practically none of the "incidents" contained in the file similarly shows an unlawful motive. By investigating these matters, Conner could have determined that they were either totally groundless or able to be resolved by face-to-face discussion. Failure to do so or engaging in a one-sided investigation by talking only to guidance counselors or parents shows a haste to build a record against de Tuncq and to be rid of him. TAMA Meat Packing Corp., supra.

Under these circumstances the District's actions suggest a predetermined plan to discover reasons to transfer de Tuncq and thus rid Novato High School of a union activist.³⁶ The transfer seems totally inappropriate for a teacher of de Tuncq's experience and record. As the Board stated in a similar case, the transfer:

³⁶The charging party has also argued that de Tuncq's

. . . is comparable to the instance where an employer formulates and implements a discriminatory hiring policy designed to prevent the introduction into the work facility of known union sympathizers. Carlsbad Unified School District (1/30/79) PERB Decision No. 89, at pp. 12, 13.

Thus it is concluded that the charging party has met its initial burden of showing a "harmful nexus" between a right protected by the EERA and the District's actions. Grossmont Community College District (3/19/80) PERB Decision No. 117.

The District, in its brief, argues that no nexus exists. Although it is undisputed that de Tuncq had a history of union activism, the District argues, there was no one act or incident related to protected activity to which charging party can point in support of its argument that the requisite nexus exists. This argument is without merit. The fact that there appears to be no single protected act by de Tuncq which provoked the discriminatory transfer does not warrant a conclusion that no nexus exists. The timing of the transfer:

transfer violated the collective bargaining agreement, thereby evidencing further unlawful motive on behalf of the District. This argument goes as follows. The contract provides only two reasons for which the District can involuntarily transfer an employee - a staff reduction at a school and a program change in special services. Since de Tuncq's transfer was for neither of these reasons, according to charging party, the contract has been violated. The express language in the contract is unclear as to whether involuntary transfer must be for only these two reasons, and the negotiating history as testified to by witnesses for both parties did little to clear up the meaning of this clause. Therefore, it cannot be concluded that the transfer violated the contract and no unlawful motive can be attributed to the District by way of a contract violation.

. . . may reflect nothing more than a particular employer's superior sophistication [and] is not sufficient basis to disregard otherwise substantial evidence of unlawful motivation. Stoffel Seals Corp. (1972) 199 NLRB 1084 [81 LRRM 1363], enf. (CA 5 1973) 480 F.2d 923 [83 LRRM 2528]. See also Florida Medical Center, Inc.

The requisite nexus having been established, let us now turn to the application of the test.

A portion of the Carlsbad test states:

A charge will be sustained where it is shown that the employer would not have engaged in the complained of conduct but for an unlawful motivation, purpose or intent Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However following generally accepted principles the presence of such unlawful motivation purpose or intent may be established by inference from the record as a whole. Carlsbad Unified School District, supra, at p. 11.

The requisite unlawful motive may be readily inferred from the record in this case since the District's reasons for transferring de Tuncq, a recognized union activist, have been found to be wholly without merit.³⁷

If [the trier of fact] finds that the stated motive for a [transfer] is false, he certainly can infer that there is another

³⁷The record shows, i.e., that de Tuncq was not stale and therefore did not need a change. Also., the complaints against de Tuncq were without merit, or not supported by the record evidence, and the class size statistics are not indicative of parent or student dissatisfaction with de Tuncq.

motive. More than that, he can infer that the motive is one that the employer desires to conceal - an unlawful motive - at least where, as in this case, the surrounding facts tend to reinforce that inference. Shattick Denn Mining Corp. v. NLRB (CA 9, 1966) 362 F.2d 466 [62 LRRM 240, p. 2404].

Under the circumstances presented here, the hearing officer is compelled to draw the inference that the District's transfer of de Tuncq was motivated by his many years of protected activity. This inference is based primarily on the pretextual nature of the offered reasons for the transfer. See Belridge School District (12/31/80) PERB Decision No. 157; Marin Community College District, supra. However, as the foregoing discussion indicates, the record is replete with evidence which supports this inference.

This evidence may be summarized as follows. de Tuncq had a 23-year history of outstanding service at NHS and was elected chairperson of his department. No chairperson had ever been transferred for any reason. The record shows that the recent complaints were totally inconsistent with de Tuncq's excellent evaluations while a teacher under Conner. Prior incidents of a similar nature were considered so insignificant they were not recorded in any evaluation.

Furthermore, the complaints which were used by Conner to put a blemish on de Tuncq's record were based on policies used by de Tuncq, known to Conner and never challenged in any way. Most of these complaints and/or drops were never investigated

by Conner, nor were they ever brought to de Tuncq's attention so that he could be advised as to how they could be corrected.

Conner's failure to provide de Tuncq with an adequate explanation of the transfer in writing or during the grievance procedure indicates unlawful motive. When Conner did articulate reasons for the transfer, they emerged as vague and **shifting**. Finally, the secret file, kept in apparent violation **of the** District's own policy as well as the Education Code, is evidence of unlawful motive. Thus, under this part of the Carlsbad test, it is found that the District violated section 3543.5(a). **it is found** that the District violated section 3543.5(a).

Another part of the Carlsbad test provides that:

Where the harm to employees' rights is slight and the employer offers justification based on operational necessity the competing rights of the employer and the rights of the employees will be balanced and the charge resolved accordingly. Carlsbad Unified School District, *supra*, at p. 10.

The District's actions have resulted in at least slight harm to de Tuncq's rights under the Act, as well as to rights of other teachers at NHS, since the transfer had the "natural and probable consequences of causing other employees to fear that similar action would be taken against them if they engaged in organizing" for NFT. Carlsbad Unified School District, *supra*, at p. 13. Thus, a prima facie case has been established and it is incumbent upon the District to come forward with justification based on operational necessity to explain its actions. If it does so the rights of the parties are balanced

and the charges resolved accordingly. Here, however, the District's reasons have been found to be pretextual and totally without merit. Thus, the balancing aspect of the Carlsbad test need not be applied. The District has violated section 3543.5(a). See Belridge School District, supra; Marin Community College District, supra; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169].

Even assuming that the reasons offered by the District were found to have some merit, thus triggering the balancing aspect of the Carlsbad test, this would not alter the conclusion that section 3543.5 (a) has been violated. In balancing the parties' rights, it is difficult to find record evidence that indicates the transfer improved the operation of the District, or in any way helped the District to carry out its mission. The record is similarly devoid of evidence that the transfer corrected the alleged shortcomings of George de Tuncq.

With respect to de Tuncq, even in his new position at San Jose Junior High School he would have to deal with parents and students, and he may have emerged as "stale" at the junior high school level as he allegedly was at the senior high school level. The District has offered no concrete evidence that the transfer in and of itself would correct his alleged shortcomings in these areas. Similarly, there was no evidence presented that the District has taken any affirmative steps to correct these perceived shortcomings, nor has it acted to require or even

suggest that de Tuncq change his policies relating to grading, assigning work or dropping classes. The District simply ignored the possibility of any corrective action other than the drastic step it took. Indeed, not only did the District make no attempts along this line, Conner, by virtue of his positive evaluations and failure to bring these matters to de Tuncq's attention in any meaningful fashion, actually led de Tuncq to believe that no problems existed. If Conner genuinely believed that de Tuncq's conduct undermined the educational process in any significant way, he surely would have taken other corrective measures at an earlier stage; alternatively, he could have taken other more constructive measures at the time of the transfer. The failure to do so weights heavily against the District in any balancing process.

Moreover, given the circumstances under which the transfer was made, it appears as if it was harmful to the educational process. Conner testified favorably with regard to de Tuncq's teaching ability, and said it did not figure in his decision to transfer. Thus, students at NHS were denied the benefits of de Tuncq's experience and teaching ability in certain "advanced" classes. Also, the social studies department as a whole lost the chairman who had obviously performed admirably in the past in this position.

de Tuncq was assigned to the junior high school level to teach U.S. history and law, the latter a subject about which he

admittedly knew very little. To make room for him at the San Jose Junior High School, the District had to shuffle the assignments of other teachers after the fall term had begun. This scenario of events does not strike the hearing office as furthering any educational objectives.

Additionally, de Tuncq's transfer seriously interfered with rights guaranteed by the EERA. Teachers at NHS were denied their most vocal and active union representative and the local union was undermined in the eyes of unit employees. This had the natural and probable consequences of chilling the exercise of protected rights under the Act. Moreover de Tuncq was denied the right to engage in protected activity at NHS. More importantly he was penalized for engaging in such activity.

On balance, even accepting the District's reasons for the transfer as having some merit, the offered justification, especially in view of the District's alternatives, does not outweigh the harm to employee rights which would flow from de Tuncq's transfer.

Based on the foregoing, it is concluded that by transferring George de Tuncq the District violated section 3543.5(a). In these circumstances, retaliation against a Federation activist for participating in protected activity is also a concurrent violation of section 3543.5(b). Santa Monica Unified School District (12/10/80) PERB Decision No. 147.

The Right to Information

Charging party argues that the District violated the Act by refusing to provide information regarding involuntarily transferred employees to the Federation. The District, on the other hand, argues that it provided the information in a timely manner.

It is well established that an employee organization has the right to information which is necessary and relevant to carrying out its responsibilities as an exclusive representative. Stockton Unified School District (11/3/80) PERB Decision No. 143. Under the circumstances presented here, it is concluded that the Federation was not denied its right in this regard. The District did not have the information available at the time of the request. However, it provided the information within approximately one week of the request and District representatives met with Federation representatives to discuss the matter. There was no evidence presented to show that the Federation was disadvantaged in representing unit employees by this short delay.

Therefore, the Federation's charge that it was denied information in violation of its statutory rights is hereby dismissed.

REMEDY

Under Government Code section 3541.5 (c), PERB is given:

. . . the power to issue a decision and order

directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Under the circumstances presented here, it is appropriate to order the District to cease and desist from discriminating against employees by transferring them because of their exercise of protected rights under the EERA. In addition, it is appropriate to order the District to reinstate George de Tuncq to his former or equivalent position at NHS, including reinstatement as chairperson of the social studies department, and to make him whole for any losses, economic or otherwise, sustained as a result of the District's discriminatory action. This remedy is consistent with that imposed by the Board in a similar discriminatory transfer. See Carlsbad Unified School District, supra.

In addition, it is appropriate to order the District to cease and desist from denying the Federation the right to represent members in the negotiating unit by transferring employees for engaging in protected activity on behalf of the Federation and the employees it represents. See Santa Monica Unified School District, supra, PERB Decision No. 147.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The

notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

Finally, it is appropriate to dismiss that part of the Federation's charge dealing with the alleged refusal of the District to provide relevant and necessary information to enable it to carry out its responsibilities as the exclusive representative.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5 (c) of the Educational Employment Relations Act, it is hereby ordered that the Novato Unified School District and its respective agents shall:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on George de Tuncq, discriminating or threatening to discriminate against George de Tuncq or otherwise interfering with, restraining, or coercing George de Tuncq because of the exercise of his rights to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations, including the right to file grievances and otherwise serve as a representative of the Novato Federation of Teachers, by discriminatorily transferring George de Tuncq from his position of social studies teacher and department chairperson at Novato High School to the position of social studies teacher at San Jose Junior High School;

(b) Denying the right of the Novato Federation of Teachers, Local 1986, AFT, AFL-CIO to represent unit members by transferring George de Tuncq for engaging in protected activity on behalf of the Federation and members of the negotiating unit it represents.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

(a) Upon request, immediately offer to George de Tuncq full reinstatement to his former or equivalent position at NHS, including chairperson of the department, without prejudice to his seniority or other rights, benefits and/or privileges enjoyed;

(b) Make George de Tuncq whole for any losses of pay and/or other benefits he may have incurred as a result of the discriminatory transfer. Payment on such losses shall be at the interest rate of seven per cent per annum.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(d) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

That part of the Federation's charge dealing with the refusal of the District to provide information is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 12, 1981, unless a party files a timely

statement of exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on August 12, 1981, in order to be timely-filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: July 23, 1981

FRED D'ORAZIO
Hearing Officer

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California



After a hearing in Unfair Practice Case No. SF-CE-473, in which all parties had the right to participate, it has been found that the Novato Unified School District violated Government Code sections 3545.5(a) and (b).

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on George de Tuncq, discriminating or threatening to discriminate against George de Tuncq or otherwise interfering with, restraining, or coercing George de Tuncq because of the exercise of his rights to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations, including the right to file grievances and otherwise serve as a representative of the Novato Federation of Teachers, by discriminatorily transferring George de Tuncq from his position of social studies teacher and department chairperson at Novato High School to the position of social studies teacher at San Jose Junior High School;

(b) Denying the right of the Novato Federation of Teachers, Local 1986, AFT, AFL-CIO to represent unit members by transferring George De Tuncq for engaging in protected activity on behalf of the Federation and members of the negotiating unit it represents.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

(a) Upon request, immediately offer to George de Tuncq full reinstatement to his former or equivalent position at NHS, including chairperson of the department, without prejudice to his seniority or other rights, benefits and/or privileges enjoyed;

(b) Make George de Tuncq whole for any losses of pay and/or other benefits he may have incurred as a result of the discriminatory transfer. Payment on such losses shall be at the interest rate of seven per cent per annum.

Dated: _____

NOVATO UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.